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No.

In the
Supreme Court of the United States

OCTOBER TERM, 1996

FEDERATION FOR AMERICAN IMMIGRATION REFORM, INC.,
Petitioner

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES, ET.AL.,
Respondents

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do individuals who live and work in an immigration-impacted community lack standing to challenge a federal agency's unlawful admission of tens of thousands of additional immigrants into their community because, as the court of appeals decided, Congress would not have intended to permit so numerous a class of potential plaintiffs to challenge an agency that is not under pressure from "powerful domestic interest groups"?

PARTIES

The petitioner is Federation for American Immigration Reform, Inc. ("FAIR"). FAIR has no parent company and no subsidiaries

The respondents ("Respondents") are Janet Reno, Attorney General of the United States, and Doris Meissner, Commissioner of the U.S. Immigration and Naturalization Service.

The petitioner and the respondents were the parties to the proceedings below. In the district court proceedings, FAIR was the plaintiff and Respondents were the defendants. In the appellate proceedings, FAIR was the appellant and Respondents were the appellees.

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PETITION FOR WRIT OF CERTIORARI

The Federation for American Immigration Reform ("FAIR") petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a) is reported at 93 F.3d 897 (1996). The opinion of the United States District Court for the District of Columbia (App. 27a) is reported at 897 F. Supp. 595 (1995).

JURISDICTION

The court of appeals entered its judgment on December 30, 1996. FAIR's petition for rehearing and a suggestion of rehearing *in banc* were denied on December 30, 1996. (App. 49a, 50a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 101(a)(16), 201(a), 202(a)(1), 211(a), 212(d)(5), and 244a(a)(1) and (g) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(16), 1151(a), 1152(a), 1181(a), 1182(d)(5), 1254a(a)(1), (g), are reproduced in pertinent part in the Appendix at 66a.

The Cuban Adjustment Act of 1966 is reproduced in the Appendix at 67a.

STATEMENT

FAIR brought this suit under the Administrative Procedure Act ("APA") on behalf of approximately 1,400 FAIR members living in Dade County, Florida. FAIR's Complaint alleged that Respondents Reno and Meissner were enabling tens of thousands of Cuban nationals to immigrate and settle within Dade County in violation of specified provisions of the Immigration and Nationality Act ("INA") and the Cuban Adjustment Act. The Complaint alleged that Dade County labor markets, public hospitals, and public schools were already severely overcrowded from prior waves of lawful and unlawful immigration, and that the additional immigration caused by Respondents' unlawful actions was therefore likely to injure FAIR members who

were looking for work in Dade County, seeking health care in Dade County public hospitals, or sending their children to Dade County public schools.

The district court granted Respondents' motion to dismiss the Complaint under Rule 12(b)(1), holding that none of FAIR's members would have constitutional standing to sue. (App. 43a-47a.) In a split decision the court of appeals affirmed, but on different grounds, holding that FAIR's members would lack "prudential standing" to sue because their interest in avoiding the adverse effects of excessive immigration were not within the "zone of interests" protected by the INA provisions that the Complaint seeks to enforce. (App. 13a.)

The court of appeals ruled that for FAIR to have standing, the INA or its legislative history must show that persons like FAIR's members were "intended beneficiaries" of the statute or "suitable challengers" of unlawful agency action. (App. 4a, 9a.) The court was not satisfied from its reading of the INA's legislative history that the statutory restrictions at issue, as opposed to the INA's immigration limits, were intended to protect individuals living or working in immigration-impacted communities. (App. 6a-7a, 11a-13a.) Lacking decisive evidence of what Congress intended, the court looked to the "immigration context" to determine whether FAIR members would be "suitable challengers" of the alleged violations. (App. 9a-11a.) The court concluded that the class of persons who might suffer the negative effects of immigration was too numerous to act as "suitable challengers" of unlawful action by immigration officials unless the officials were subject to pressure from "powerful pro-immigration interest groups", which the court believed was not the case. (App. 10a.)

The dissenting opinion found that the INA's legislative history sufficiently showed that the INA's limits on

immigration were intended to prevent the type of injuries alleged in FAIR's Complaint and that the INA's restrictions on Respondent's authority which the Complaint sought to enforce were intended to prevent a circumvention of those limits. (App. 15a-18a.) The dissent concluded that to require any additional evidence of congressional intent to permit the suit contradicted this Court's "express instruction" in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987), that for APA standing "there need be no indication of congressional purpose to benefit the would-be plaintiff". (*Id.*) The dissent also argued that to deny standing based on the size of the protected class conflicted with decisions such as *Sierra Club v. Morton*, 405 U.S. 727 (1972), which hold that individuals may challenge agency violations of statutes that protect widely shared interests so long as the individuals allege personalized injuries. (App. 18a-19a.)

A. FAIR's Complaint

The actions challenged by FAIR's Complaint originated with a commitment made by representatives of the United States Government to the Cuban Government during the most recent Cuban immigration crisis. Prior to August of 1994, the Cuban Government had forcibly prevented unauthorized departures from Cuba. The United States Government had criticized that policy and had been permitting the few Cubans who evaded the policy to land and remain in the United States. In August of 1994, the Cuban Government suspended its anti-departures policy, prompting thousands of Cubans to leave Cuba in boats headed for the United States. In response, the United States Government ended its policy of allowing Cubans to land and remain in the United States and sent representatives to hold talks with the Cuban Government.

A "Joint Communiqué" signed by representatives of the United States and Cuban Governments on September 9, 1994 confirmed that the Cuban Government had resumed its policy of preventing unauthorized departures and that the United States Government had ended its policy of allowing Cubans to reach the United States by irregular means. The Joint Communiqué also committed the parties to facilitate lawful immigration and stated: "The United States ensures that total legal migration to the United States from Cuba will be a minimum of 20,000 Cubans each year, not including immediate relatives of United States citizens." (App. 33a.)

The INA limits the number of immigrants that Respondents may admit into the United States and allows immigration only by aliens in certain statutory categories, such as relatives of citizens. 8 U.S.C. § 1151(a). Because the number of Cuban immigrants who could lawfully be admitted under these numerical and eligibility limits was far less than 20,000, Respondents proposed to achieve the targeted migration level by (1) holding lotteries in Cuba for the opportunity to immigrate, (2) bringing lottery winners to the United States under color of the Attorney General's power to temporarily "parole" aliens into the United States, and (3) later "adjusting" them to lawfully admitted status under the Cuban Adjustment Act of 1966. (App. 34a.)

On November 16, 1994, FAIR filed its Complaint (App. 51a-68a) in the United States District Court for the District of Columbia. The district court's jurisdiction was invoked under 28 U.S.C. § 1331 as a claim arising under the laws of the United States, under 28 U.S.C. § 1329 as a civil action arising under the INA, under 5 U.S.C. § 702 as a civil action arising under the APA, and under 28 U.S.C. §§ 2201 and 2202 as a civil action seeking, in addition to other remedies, a declaratory judgment. Because the Complaint was

dismissed on the pleadings, its allegations have been treated as true in the proceedings below.

The Complaint alleged that nearly 600,000 legal and illegal immigrants had settled in Dade County since 1970, overwhelming the capacity of local labor markets to provide employment for the local workforce and the capacity of public schools and hospitals to provide essential educational and health services to local residents. (App. 57a.) The Complaint recited U.S. Department of Labor statistics showing that the Dade County unemployment rate was 31% higher than in the rest of Florida, Florida Department of Education statistics showing that public school enrollment exceeded school capacity by 60,000 students, and similar statistics relating to hospital and police protection services. (App. 57a-60a.)

In affidavits individual FAIR members detailed the injuries they were personally suffering from immigrant labor competition and from severely overcrowded schools and hospitals.[1] Citing government statistics that 75% of all Cuban immigrants have settled in Dade County (App. 53a), the Complaint alleged that the increased immigration into Dade County likely to be caused by Respondents' unlawful actions threatened to exacerbate the specific injuries already being suffered by FAIR members (App. 54a).

The Complaint alleged that Respondents' actions to bring tens of thousands of ineligible Cuban immigrants to the United States violated the following restrictions on their authority:

(1) Paroling Cuban immigrants to bring them permanently into the United States violates 8 U.S.C. §

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[1] The affidavits were not introduced in the proceedings below because the suit was dismissed on the pleadings.

1182(d)(5), which requires that parolees be released into the United States only "temporarily" and be eventually returned to custody and treated like other applicants for admission. (App. 63a-64a.)

(2) Permitting paroled Cuban immigrants to remain in the United States until their status can be adjusted violates 8 U.S.C. § 1254a(g), which prohibits the use of parole to permit a group of aliens to remain temporarily in the United States because of their nationality. (App. 64a-65a.)

(3) Issuing documentation allowing ineligible Cuban immigrants to enter and remain in the United States violates 8 U.S.C. § 1101(a)(16), which requires that immigrant visas be issued only by consular officers and only in the numbers permitted by the INA. (App. 65a-67a.)

(4) Adjusting the paroled Cuban migrants to lawfully admitted status exceeds the authority conferred by the Cuban Adjustment Act, since most of the Cubans are not "eligible to receive an immigrant visa," a precondition of adjustment under the Act. (App. 67a.)

While this suit was on appeal, 8 U.S.C. § 1182(d)(5) was amended by Congress to require that the Attorney General's parole authority be exercised only on a "case-by-case basis". Pub. L. No. 104-208, § 602, 110 Stat. 3009-1 (Sept. 30, 1996). The Report of the House Judiciary Committee states that this restriction reaffirmed the intention of Congress that parole not be used "to admit aliens who do not qualify for admission under established legal immigration categories". H.R. Rep. No. 469 (pt. 1), 104th Cong., 2d Sess. 141 (1996). The Report stated that in recent years the Attorney General had contravened the intent of 8 U.S.C. § 1182(d)(5) by using parole "to admit entire categories of aliens who do not qualify for admission under any other category in the immigration law" and cited Respondents' Cuban parole program as a specific example of this "abuse". *Id.* at 140.

B. The Proceedings Below

The district court dismissed FAIR's Complaint on the grounds that its allegations did not establish the "traceability" and "redressability" elements of constitutional standing. (App. 43a-47a.) The court held that the alleged injuries were not "traceable" to Respondent's actions because they might be ameliorated by additional local government spending and that they were not "redressable" because FAIR members might suffer an equivalent injury if the court's injunction prompted the Cuban Government to permit irregular departures again. (*Id.*) The court held that the case was "justiciable", citing *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986). (App. 37a-43a.)

The court of appeals affirmed the district court's dismissal of the Complaint, but on different grounds. The majority opinion did not address constitutional standing or justiciability, but held instead that FAIR members lacked "prudential standing" because they were outside the "zone of interests" of the statutory provisions alleged to have been violated. (App. 6a-13a.)

The majority took its "zone of interests" test from the circuit's prior decision in *Hazardous Waste Treatment Council v. EPA,* 861 F.2d 277 (D.C. Cir.), *cert. denied*, 490 U.S. 1106 (1989). (App. 4a.) In *Hazardous Waste*, 861 F.2d at 282-83, the court of appeals had found that the zone of interests test formulated in *Clarke v. Securities Industry Ass'n,* 479 U.S. 388 (1987), was "somewhat unclear" and proposed the following "operational meaning":

> Where [congressional intent to benefit the plaintiff] is plain, we may entertain a presumption of standing . . . . In

> the absence of apparent congressional intent to benefit, however, there may still be standing if some factor--some indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect--supports an inference that Congress would have intended eligibility.

Citing *Hazardous Waste* as precedent, the majority in the instant case defined the zone of interests test as follows:

> In light of the Supreme Court's decision in [*Clarke*], we have viewed parties as showing a protected interest if either they were intended by Congress as "beneficiaries" of the statute or we could infer that Congress intended them as a "suitable challenger".

(App. 4a.) According to the majority, the showing of congressional intent must come from the statute or its legislative history:

> The question under the zone-of-interests test of § 702 [of the APA] is simply whether the language of the statutes invoked by the plaintiff or the supporting legislative history suggests a congressional intent to permit the plaintiff's suit.

(App. 9a.)

Reviewing the INA's legislative history, the majority found no decisive evidence that FAIR's Dade County members fell within any class of intended "beneficiaries". According to the majority, expressions of congressional concern about the local impact of excessive immigration were few and "trivial" (App. 6a), while those addressed to labor market impact were connected to the INA's numerical limits on immigration, which did not seem to have an

integral relationship to the parole, visa issuance, and status adjustment restrictions that Respondents were alleged to have violated (App. 11a-13a). Without decisive evidence of what Congress intended in either the INA or its legislative history, the majority declared itself in a "vacuum" (App. 9a) without "any obvious tie-breaking rule" (App. 11a).

To break the tie left by Congress's silence, the majority looked to the size of the potential plaintiff class and the "immigration context". (App. 10a-11a.) Having rejected a narrow zone of interests limited to labor market participants or to residents of immigration-impacted communities, the majority reasoned that a zone of interests that included FAIR's Dade County members would also have to include all other United States residents likely to suffer from "the generic negative features of immigration". (App. 7a-8a.) The majority concluded that Congress was unlikely to have intended that so nearly "universal" a class of potential litigants should serve as the INA's "litigative champions," unless the Immigration and Naturalization Service were exposed to "acute pressure from powerful pro-immigration interest groups". (App. 10a.) The majority decided that immigrants were ill-suited to exert such pressure. (*Id.*) The immigration context was distinguished from the environmental context, where "universal litigative champions" were needed to offset the distorting influence on agency decisionmaking of "obvious and powerful domestic interest groups". (*Id.*)

The dissenting opinion wrote that the majority's interpretation of the zone of interests test "ignores express instruction from the Supreme Court" in *Clarke* and "fashions a new standard without any previous support". (App. 15a.) In *Clarke* this Court held that the zone of interests test in an APA case requires "no indication of congressional purpose to benefit the would-be plaintiff" and instead denies a right

to review "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit". 479 U.S. at 399-400.

The dissent argued that FAIR satisfied *Clarke's* consistent-purpose test and that there was no authority for the court to supplant that test with one that determines reviewability based on the size of the protected class. (App. 18a.) The dissent found that the majority's test conflicted with cases such as *Sierra Club v. Morton*, 405 U.S. 727, 737-38 (1972), wherein this Court has held that agency violations of statutes protecting the general public can be challenged by individuals who allege particularized injury. (App. 18a-19a.)

The dissent also disagreed with the majority's assumption that the INA restrictions which the Complaint sought to enforce bore no "integral relationship" to the numerical and eligibility limits that protect the interests asserted by FAIR. (App. 16a-17a.) The dissent quoted legislative history showing that the statutory restrictions on parole that Respondent Reno is alleged to have violated were enacted to keep parole a strictly limited exception to the general limits on admissions. (*Id.*) The dissent noted that the plaintiff found by this Court to have standing in *Clarke* was also challenging an agency's unlawfully broad application of an exception to a rule of general application. (App. 17a n.2.)

The dissent would have affirmed the district court's decision that the case was justiciable and would have reversed its decision that FAIR lacked constitutional standing. (App. 19a-26a.) Citing *Duke Power Co. v. Carolina Envt'l. Study Group, Inc.*, 438 U.S. 59, 78 (1978), the dissent found that the possibilities that local governments might alleviate the injuries caused by Respondents' actions or that the Cuban Government might change its policy again

were too "speculative and hypothetical" to negate the fact that "but for" Respondents' actions, the Cubans in question would not be able to settle in Dade County. (App. 22a & n.8, 23a-24a.)

REASONS FOR ALLOWANCE OF THE WRIT

The writ of certiorari should be allowed for the following reasons:

1. The interests of FAIR's Dade County members in avoiding the adverse economic consequences of immigration in excess of INA immigration limits are within the zone of interests of the INA restrictions that Respondents are violating because those INA restrictions were intended to prevent a circumvention of the immigration limits.

2. The District of Columbia Circuit's formulation of the zone of interests test in *Hazardous Waste* and the instant case, requiring statutory or committee report evidence of congressional intent to benefit the plaintiffs or to permit their suit, conflicts with this Court's express instruction in *Clarke* that the APA zone of interests test requires *no* evidence of congressional intent to benefit the plaintiff.

3. The holding below that the widespread nature of an injury serves as a "tie-breaking rule" disfavoring review has repeatedly been rejected by this Court in decisions such as *Sierra Club*.

4. The District of Columbia Circuit's "suitable challenger" test requires judges to engage in inappropriate inquiries and determinations concerning the relative political influence of domestic interest groups.

1. The Interests Asserted in FAIR's Complaint Are Clearly Within the "Zone of Interests" of the INA's Restrictions on Respondents' Authority.

The dissent below considered it obvious from the INA's legislative history that the INA's restrictions on the admission of immigrants were intended to protect the interests of United States residents. (App. 17a.) The majority did not dispute that general proposition, but determined that (1) Congress had shown no *special* concern for residents of immigration-impacted communities, such as Dade County, and (2) congressional concerns about labor market impact related to the INA's numerical limits rather than to the INA's restrictions on parole, visa issuance, and status adjustment. (App. 6a-7a, 13a.)

Contrary to what the majority concluded, the INA's legislative history demonstrates (1) that Congress *was* aware that the negative features of immigration had a primarily local impact and (2) that the INA's parole, visa issuance, and status adjustment provisions *are* integrally related to the numerical and eligibility limits.

The first numerical limits on immigration, known as "area quotas", were imposed by the Quota Law of 1921, 42 Stat. 5. Among the purposes given for imposing immigration restrictions were that a large majority of immigrants were settling in "congested districts" and that unemployment and housing shortages made it impractical not to restrict immigration. H.R. Rep. No. 4, 67th Cong., 1st Sess. 3, 6 (1921). The area quotas were extended by the Immigration Act of May 11, 1922, 42 Stat. 540, were made permanent by the Immigration Act of May 26, 1924, 43 Stat. 153, and were continued by the INA when it was enacted in 1952.

In 1965, when Congress amended the INA to apply the numerical limits on a hemispheric rather than national basis,

it declared that limits were set to reflect "the present absorptive capacity of the country" and "to protect the American labor market from an influx of both skilled and unskilled foreign labor". S. Rep. No. 748, 89th Cong., 1st Sess. 14, 15 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3332-33. This Court has itself observed: "We have often recognized that a 'primary purpose in restricting immigration is to preserve jobs for American workers'." *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991) (citation omitted).

Congress did not forget after 1921 that the adverse consequences of excessive immigration are felt mainly in the localities where the immigrants settle. In 1986, concerned that the INA's numerical limits were being circumvented by illegal immigration, Congress passed the Immigration Reform and Control Act, which penalized employers that hired illegal aliens. The Senate Judiciary Committee's Report stated:

> Because the well-being of individuals is affected by both economic and noneconomic circumstances, an immigration policy which serves the national interest should be based on an analysis of both the economic and noneconomic impacts of immigration. . . .
>
> [National immigration] figures actually underestimate the impact of immigration. Since it is concentrated in only a few regions of the country, the impact on those regions is of much greater significance that the overall figure suggests.

S. Rep. No. 132, 99th Cong., 1st Sess. 4, 5 (1985).

Without saying why, the majority declined to consider the 1921 legislative history. It also discounted the 1986 legislative history as a "trivial" exception addressed only to

the "current problems" of the time.[2] (App. 6a.) The majority did *not* dismiss as "trivial" the statements of congressional intent to protect American *workers*, but considered them unhelpful to FAIR's standing because they related only to the INA's numerical limits. (App. 11a-13a.)

Falling within the zone of interests of a particular statutory provision does not automatically bring a plaintiff within the zone of interests of the statute's other provisions. *Air Courier Conf. of America v. American Postal Workers Union,* 498 U.S. 517, 529-30 (1991). However, FAIR's Complaint challenges violations of restrictions on Respondents' authority that exist *expressly* to ensure that the INA's numerical and eligibility limits are not circumvented, and the Complaint spells out the relationships in some detail. (App. 60a-63a.) While the majority opinion below asserts that the provisions are "apparently unrelated" and "do not seem" to be related (App. 7a, 13a), it does not disclose the analysis of the statutory scheme that led the majority to its conclusion. The dissenting opinion, in contrast, quotes from legislative history wherein Congress itself explained the integral relationship between the INA's restrictions on parole and the INA's numerical and eligibility limits on admissions. (App. 16a-17a.)

The INA was the first immigration statute that authorized the Attorney General to "parole" aliens who could not otherwise be admitted into the United States. The accompanying Report of the House Judiciary Committee stated that the discretionary authority to waive the INA's "strict

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[2] It is improbable that Congress perceived the disproportionate impact of immigration as only a "current problem". In 1995 just three states received 50% of that year's immigrants. *See* Immigration and Naturalization Service, *Immigration to the United States in Fiscal Year 1995* 17 (March, 1996).

qualitative tests" for admission "should be surrounded with strict limitations". H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1705. The original "strict limitations", still in force, include the requirements that aliens be paroled only "temporarily" and that they eventually be returned to custody and treated like other applicants for admission. 8 U.S.C. § 1152(d)(5)(A).

In 1965, when revoking a power granted in 1960 to parole groups of refugees, the Senate Judiciary Committee reported:

> [I]t is the express intent of the committee that the parole provisions of the Immigration and Nationality Act . . . be administered in accordance with the original intention of the drafters of that legislation. The parole provisions were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, *and not for the immigration of classes or groups outside the limit of the law.*

S. Rep. No. 748, 89th Cong., 1st Sess. 17 (1965)(emphasis added), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3335.

As noted *supra* at 7, Congress stated in connection with a 1996 amendment to the INA's parole provision that both before and after the amendment it was unlawful to use parole for the admission of "entire categories of aliens who do not qualify for admission under any other category in the immigration law". H.R. Rep. No. 469, *supra*, at 140-41.

The First and Eleventh Circuits have both discerned an integral relationship between the INA's restrictions on parole and its limits on immigration. In a decision affirmed by this Court, the Court of Appeals for the Eleventh Circuit stated:

> The reason that Congress has passed legislation regulating the admission of aliens is its concern about how their entry will affect the economic, political, and social well-being of this nation. The grant of parole is subject to certain restrictions . . . and implicates many of the same considerations--such as employment and national security concerns--that justify restrictions on admission.

Jean v. Nelson, 727 F.2d 957, 971-72 (11th Cir. 1984) (footnote omitted) (*en banc*), *aff'd*, 472 U.S. 846 (1985). *See also Amanullah v. Nelson*, 811 F.2d 1, 13 (1st Cir. 1987).

The visa issuance and status adjustment restrictions which the Complaint also addresses are even more closely integrated with the INA's limits on immigration. The INA's immigration limits are not limits on admissions *per se*; rather, they are limits on the number of immigrant visas that may be issued and on the types of person to whom they may be issued. 8 U.S.C. § 1151(a). The Complaint expressly alleges that Respondents are unlawfully issuing immigrant visas that are precluded by the numerical limits and eligibility requirements of the INA. (App. 66a, ¶47.)

Similarly, although the Cuban Adjustment Act is not itself part of the INA, the numerical and eligibility limits of the INA apply, not only to aliens seeking immigrant visas under the INA, but also to aliens "who may otherwise acquire" lawfully admitted status, which would include those adjusted to such status under the Cuban Adjustment Act. 8 U.S.C. § 1151(a).

2. The Decision Below Misstates the "Zone of Interests" Test in *Camp* and *Clarke*.

Without what it considered to be decisive evidence in the INA's legislative history on whether Congress intended to

protect people like FAIR members or to permit suits such as this one, the majority found itself in a "vacuum" with "no obvious tie-breaking rule" and endeavored to break the "tie" by seeking congressional intent in the "immigration context". (App. 9a-10a.) However, the whole point of this Court's APA standing jurisprudence has been to renounce the elusive search for indicia of congressional intent where none is expressed and to establish a uniform "tie-breaking rule" that favors review unless the plaintiff's interest is inconsistent with, or not more than marginally related to, the statute's purpose.

The origin of the "zone of interests" test is *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970), wherein this Court held that, apart from the constitutional minima, the standing inquiry concerns "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question". The *Camp* case, like the instant case, proceeded under section 10 of the APA, which confers a cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute", excepting statutes that "preclude judicial review". 5 U.S.C. §§ 701(a)(1), 702.

While *Camp* did not elaborate on the difference between the "zone of interests" test for APA and non-APA suits, subsequent Supreme Court decisions have done so. When a suit against unlawful agency action is *not* subject to the APA, the court must first decide whether a right of action exists at all, let alone whether the particular plaintiff should be permitted to exercise it. *Clarke v. Securities Industry Ass'n,* 479 U.S. 388, 400 n.16 (1987). If the statute itself does not confer such a right, standing may require a showing of congressional intent to benefit the specific interest

asserted by the plaintiff. *Id.* In other words, when the APA is inapplicable, congressional intent to *permit* the suit is established by showing congressional intent to *protect* the plaintiff.

When the APA *is* applicable, the right of action is supplied by the APA itself and no showing of intent to permit the suit or to protect the plaintiff is needed. *Clarke*, 479 U.S. at 399-400. Quite the opposite; reviewability is presumed unless an intention to preclude review "is fairly discernible in the statutory scheme". *Camp*, 397 U.S. at 157. Congress made that clear enough in the House Report on the APA:

> The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.

H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946). Congress's silence favors the plaintiff. "[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Community Nutrition Institute,* 467 U.S. 340, 351 (1984).

Because the right of action in an APA suit depends only on whether Congress clearly intended to preclude review and not on whether the statute was intended to protect the plaintiff's interests, the zone of interests test serves a narrower function in APA suits than in other actions to redress unlawful agency action. In the APA context the zone of interests test has been characterized as simply a "gloss" on the requirement that the plaintiff be aggrieved "within the

meaning of a relevant statute". *Clarke*, 479 U.S. at 395; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990). The purpose for this "gloss" is to balance the strong presumption of reviewability against "the potential for disruption inherent in allowing every party adversely affected by agency action to seek judicial review". *Clarke*, 479 U.S. at 397.

In *Camp* and *Clarke* this Court "struck the balance in a manner favoring review" by excluding from APA standing only plaintiffs "whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit". *Id.* at 399. While evidence of congressional intent to protect the plaintiff's interest is *sufficient* to satisfy this test, *see, e.g., Barlow v. Collins*, 397 U.S. 159, 164 (1970), such evidence is never *necessary*. "The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399 (citation and footnote omitted).

Taken together, *Camp* and *Clarke* define the APA standing inquiry as a simple, two-part test, each part weighted in favor of review. A plaintiff with concrete injury is aggrieved "within the meaning of the statute" *unless* the plaintiff's interest is inconsistent with the purpose of the statute or is so marginally related to it that the ordinary presumption of reviewability would be unreasonable. *Id.* at 399. If the plaintiff's interest falls within that liberally defined zone of interests, the challenged agency action is reviewable *unless* the "statutes preclude review," either expressly or by an intention that is "fairly discernible in the statutory scheme". *Camp*, 397 U.S. at 157.

Notwithstanding *Clarke's* "express instruction" on APA reviewability, the majority in this case applied the alternative

formulation from *Hazardous Waste,* which burdens FAIR with identifying evidence in the INA or its legislative history that Congress intended to protect the particular interests of FAIR members or would have regarded FAIR members as "suitable challengers". Yet the INA, like many statutes invoked in APA proceedings, says little or nothing about which groups Congress intended to be the statute's "litigative champions". To require courts to divine an intention when the statute, its structure, and its legislative history evince no intention at all is to invite inappropriate contextual and political analysis of the sort on which this case was decided.

In *Hazardous Waste,* and now in this case, the District of Columbia Circuit has impermissibly substituted its own "operational meaning" of the zone of interests test for the *Clarke* consistent-purpose test, which the circuit court found to be unclear. However, none of the other circuit courts have found the *Clarke* test to be so unclear as to require adding to or supplanting the tests articulated in *Camp* and *Clarke. See, e.g., UPS Worldwide Forwarding, Inc. v. U.S. Postal Service*, 66 F.3d 621, 631 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 1261 (1996); *Soler v. Scott,* 942 F.2d 597, 605 (9th Cir. 1991), *vacated on other grounds sub. nom Silvey v. Soler,* 506 U.S. 969 (1992); *National Wildlife Federation v. Agricultural Stabilization and Conservation Serv.*, 901 F.2d 673, 678 (8th Cir. 1990); *City of Milwaukee v. Block*, 823 F.2d 1158, 1167 (7th Cir. 1987), *cert. denied*, 493 U.S. 976 (1989).

3. Individuals With Particularized Injuries May Sue Under Statutes That Protect Widely Shared Interests.

As the dissent observed, the majority identified no inconsistency between the INA's purposes and FAIR's

interest in preventing the adverse economic impacts of excessive immigration. (App. 18a.) The majority's objection to standing was not that FAIR members' interests *differed* from those protected by the INA but that FAIR members had the *same* interests in preventing excessive immigration as virtually all other United States residents. (App. 7a-8a.) Because the widespread nature of the protected interest provided the "hint" of congressional intent on which the court below decided this case (App. 8a), this petition raises the question whether a plaintiff's standing is negated simply because the statute at issue protects broad segments of the general public and not just the plaintiff and persons like him.

As pointed out in the dissenting opinion (App. 18a-19a), the court's decision to deny standing based upon the widespread nature of the protected interest conflicts with decisions of this Court by failing to recognize the distinction between the public interest that is served by statutes that protect everyone and the particularized interest of an individual that is concretely affected by a federal agency's violation of the statute. As an example, the dissent cited *Sierra Club v. Morton,* 405 U.S. 727, 737 (1972), which held:

> [T]he fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.

In *Sierra Club* the Court also "noted with approval" the "trend . . . toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review". *Id.* at 738. A year later, the

Court reached the same conclusion in *United States v. SCRAP*, 412 U.S. 669, 687-88 (1973), declaring:

> But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

More recently, in *Public Citizen v. Department of Justice*, 491 U.S. 440, 449-50 (1989), the Court explained:

> The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen appellants' asserted injury, ...

4. Standing Should Not Be Determined by the Relative Influence of Domestic Interest Groups.

The new standing test fashioned by the court of appeals will have federal judges in the District of Columbia Circuit making inquiries and determinations regarding the relative influence of competing interest groups that are inappropriate to the judicial role. The perils inherent in the exercise are demonstrated by the decision below. The majority's assumption that there are no "powerful pro-immigration interest groups" pressuring the Immigration and Naturalization Service might have been refuted had FAIR been given a chance to do so.

The majority opinion assumes that the only groups likely to pressure government officials to admit ineligible immigrants are the immigrants themselves, a relatively

powerless group in the eyes of the majority. (App. 10a.) This assumption overlooks the pressures that can be exerted by U.S. relatives of immigrants, by employers wishing to hire immigrants, by ethnic and religious organizations favoring the admission of their fellows, and by elected officials with political motivations. Examples of such pressure abound, beginning with the Joint Communiqué itself. Only four months after the United States had agreed with Cuba to end its practice of releasing Cuban migrants who arrived illegally in the United States, *The Miami Herald* reported that, under pressure from "Cuban activists", the INS had "quietly" been releasing hundreds of illegal Cuban entrants, a charge confirmed by a Justice Department spokeswoman. *See* L. Alvarez, "In quiet policy shift, INS freeing rafters who make it to U.S.", The Miami Herald, Jan. 21, 1995, at 1A.

Cuban-American groups are not alone in pressuring the government to "bend the rules". In 1995 *The Washington Times* reported that the Immigration and Naturalization Service had succumbed to demands by "lobby groups" to stop enforcing statutory refugee admission requirements against Russian applicants, as a result of which many criminals and other ineligible Russian immigrants had entered the United States. *See* M. Hedges, "Vast Soviet refugee fraud detailed", The Washington Times, Nov. 4, 1995, at A1. More recently, *The Washington Post* reported that the White House, "prodded by Democratic community activists," had pressured the INS to naturalize an unknown number of ineligible aliens before the 1996 elections. *See* W. Branigin, "INS Accused Of Giving In To Politics", The Washington Post, Mar. 4, 1997, at A1.

Congress is well aware of the existence and influence of "powerful pro-immigration interest groups". Last year the immigration subcommittees of both houses approved

legislation, originally endorsed by the President, to reduce the number of immigrants that could be sponsored by businesses and relatives. Public lobbying registration records show that business and ethnic organizations employed more than 90 registered lobbyists to oppose the bill. According to *The Boston Globe*, the bill was defeated when the President withdrew his support after being informed that retaining the immigration entitlement was "the top priority" of certain contributors to the Democratic National Committee. *See* M. Kranish, "Policy shift over fund-raiser is denied", The Boston Globe, Jan. 17, 1997, at A1.

The forgoing examples are recited only because the majority opinion below used the supposed non-existence of pro-immigration pressure groups to impose a higher standard of reviewability for violations of the immigration law than has been applied to other statutes that also protect large segments of the general public. Like the dissent below (App. 18a n.4), FAIR believes that its standing ought not to depend on whether Respondents' unlawful actions are intended to advance the public interest or to appease Cuban-American pressure groups.

CONCLUSION

Because the Court of Appeals for the District of Columbia Circuit has decided the important federal question of APA standing in a way that conflicts with applicable decisions of this Court, the writ of certiorari should be allowed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 18, 1996 Decided August 30, 1996

No. 95-5369

FEDERATION FOR AMERICAN IMMIGRATION REFORM, INC.,
APPELLANT

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 94cv02459)

William W. Chip argued the cause for appellant. With him on the briefs was *Kenneth G. Starling*.

Donald E. Keener, Deputy Director, United States Department of Justice, argued the cause for appellees. With him on the brief was *Frank W. Hunger*, Assistant Attorney General.

Before: WILLIAMS, GINSBURG and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Dissenting Opinion filed by *Circuit Judge* ROGERS.

WILLIAMS, *Circuit Judge*: For decades Cuban citizens have taken dramatic—often fatal—risks to leave Cuba and get to the United States. When the United States rescued them at sea it would routinely "parole" (release) them into the country and issue them work authorization, in contrast to

the standard practice under international law of requiring a threshold showing of refugee status. But in August 1994 the Cuban government dropped its policy of forcibly preventing its citizens from emigrating to the United States by boat, and thousands of Cubans seized the opportunity. Our government in turn quickly changed its policy, barring Cubans rescued at sea from entering the United States. Instead they were transported to the Guantanamo Bay Naval Station and other safe havens, where they were held pending further developments.

One month later, in September 1994, both countries again changed their policies, issuing a Joint Communique Concerning Normalizing Migration Procedures, State Dep't No. 94-232, 1994 WL 621,517. According to the Communique, Cuba agreed "to take effective measures in every way it possibly can to prevent unsafe departures," and the United States agreed to admit at least 20,000 Cubans per year as legal immigrants, not including immediate relatives of United States citizens. Shortly after the signing of the Communique, the Commissioner of the Immigration and Naturalization Service announced that the floor on legal immigration of Cubans would be achieved in part by "paroling" several thousand Cubans into the country each year under § 212(d)(5) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1182(d)(5), and then permitting them to apply for an adjustment of status to that of lawful permanent resident under the Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (reproduced as historical note to 8 U.S.C. § 1255).

The Federation for American Immigration Reform filed suit challenging the proposed implementation of the Communique. The Federation is dedicated to "ensuring that levels of legal immigration are consistent with the absorptive capacity of the local areas where immigrants are likely to

settle." Brief for Appellant at 6. Its members include approximately 1,400 dues-paying members who live in the Miami area, where many Cuban immigrants have settled in the past. Its complaint alleges that the scheme for parole and adjustment of status of Cuban nationals contravenes various provisions of the INA and other immigration laws, and that such actions will impair the quality of life enjoyed by its members in the Miami area by, for example, diminishing employment opportunities and crowding public schools and other government facilities and services. The district court dismissed the complaint, finding that the Federation failed to establish the "traceability" and "redressability" elements of Article III standing. *Federation for Am. Immigration Reform v. Reno*, 897 F. Supp. 595 (D.D.C. 1995); see *Valley Forge College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982).

On appeal, the government argues, as it did in district court, that the Federation's challenge presents nonjusticiable political questions and that the Federation lacks constitutional and prudential standing. Because we find that the Federation lacks prudential standing, we need not consider the issue of constitutional standing or the political question doctrine.

* * *

Standing of an association as a representative of members requires that at least some of the members would have standing to sue in their own right, and also that the interests the association seeks to advance are germane to its purposes and that neither its claim nor the relief requested is such as to require participation in the suit by individual members. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 116 S. Ct. 1529, 1534 (1996); *Hunt v. Washington State Apple Advertising Comm'n*, 432

U.S. 333, 343 (1977). Neither of the latter (association-specific) requirements is in question here, so the Federation has standing if some of its members would.

The Federation brought its challenge under § 10(a) of the Administrative Procedure Act, which allows standing for one "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; see also *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). A party meets that standard if it is "arguably within the zone of interests" that Congress sought to protect or regulate under the statute in question. *Data Processing*, 397 U.S. at 153. As the Federation's members are not regulated by the immigration provisions it believes the government has violated, its claim necessarily rests on the idea that its members' interests are among those Congress sought to protect. In light of the Supreme Court's decision in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), we have viewed parties as showing a protected interest if either they were intended by Congress as "beneficiaries" of the statute or we could infer that Congress intended them as a "suitable challenger." *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988). To qualify as the latter, a party must show "less than an intent to benefit but more than a "marginal[ ] relationship' to the statutory purposes." *Id.* (quoting *Clarke*, 479 U.S. at 399).

The Federation's complaint alleges violations of several statutory provisions. Its primary claim is that the scheme for parole and adjustment of Cuban nationals is inconsistent with the temporal limits on the parole authority granted to the Attorney General under 8 U.S.C. § 1182(d)(5)(a):

> The Attorney General may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying

> for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Id. The Federation contends, as we understand it, that the Attorney General's treatment of the Cuban nationals violates the statute's mandate that parole "shall not be regarded as an admission of the alien." The Federation also argues that the adjustment of the Cubans' status to that of lawful permanent resident violates 8 U.S.C. § 1254a(g), which says that certain provisions by which the Attorney General may permit aliens to remain in the United States temporarily because of their nationality are the exclusive means to that end. It further claims that the parole and adjustment scheme has the effect of discriminating on the basis of nationality in the issuance of immigrant visas in violation of 8 U.S.C. § 1152(a)(1). Finally, it says that the adjustment of paroled Cubans to the status of immigrants lawfully admitted for permanent residence violates § 1 of the Cuban Adjustment Act of 1966, as amended (reproduced as historical note to 8 U.S.C. § 1255), because the paroled individuals do not satisfy its requirement that they be eligible to receive immigrant visas.

The Federation's theory of injury—which we assume to have satisfied the demands of constitutional standing—is that a rush of immigrants adversely affects the welfare of the Federation's members by generating unemployment and wage reductions and by placing burdens on public services such as hospitals and schools, especially in the Miami area. But cf. David Card, "The Impact of the Mariel Boatlift on the Miami Labor Market," 43 *Indus. & Lab. Rel. Rev.* 245, 250

(1990) (finding no effect on non-Cuban residents' wages from the influx of 125,000 "Mariel" Cubans in 1980). As to prudential standing, the Federation's idea is that because congressional limitations on immigration reflect concern over just such effects, the interests of Federation members must be within the zone of interests sought to be protected. The Federation presents two facets of the argument, one framed in nationwide terms and the other region-specific--focused on the Miami area, which has absorbed large numbers of Cuban immigrants over the past two decades. We turn to the latter argument first.

Interest in Limiting Immigration to Impacted Regions.

The Federation argues that "it would be hard to imagine for whose benefit Congress imposed the INA's limitations if not for the benefit of persons living in the localities where immigrants would settle if allowed to immigrate, notably the [Miami area] in the case of immigration from Cuba." The problem with this argument is that the Federation has pointed to neither language in the statutes on which it relies (8 U.S.C. §§ 1152, 1182, and 1254a and the Cuban Adjustment Act) nor, with the trivial exceptions discussed just below, legislative history that even hints at a concern about regional impact. And intent to protect residents of impacted regions does not appear so plausible from the statute itself that we will infer it without more.

Of the various pieces of legislative history cited by the Federation, only two brief passages allude to regional (as opposed to national) effects of immigration at all. One passage, contained in a Senate Report on the Immigration Reform and Control Act of 1986, mentions regional effects in a general discussion of various "current problems" related to that act, which itself is not the source of any of the Federation's claims. The relevant passage in the report reads in full:

> [National immigration] figures actually underestimate the impact of immigration. Since it is concentrated in only a few regions of the country, the impact on these regions is of much greater significance than the overall figure suggests. For example, ... assuming continuance of existing settlement patterns, the population of California would double by 2080. Over one-half of that State's population would consist of post-1980 immigrants and their descendants.

S. Rep. No. 132, 99th Cong., 1st Sess. 5 (1985). The Federation's second passage concerning regional effects is also drawn from the legislative history of the 1986 Act and this time involves a funding provision of that act (again, not connected in any way to the provisions invoked by the Federation) under which the federal government was to provide partial reimbursement of costs incurred by states due to participation of "legalized" aliens (presumably those legalized by the Act) in various public programs. H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 93 (1986). The passage notes that funds were authorized to be used for "programs of public assistance, programs of public health assistance, and services provided by local educational agencies." *Id.* These brief references to regional effects do little to establish that individuals living in immigration-impacted areas are either beneficiaries of, or otherwise suitable challengers under, the apparently unrelated statutory provisions that the Federation claims the government violated here.

General Interest in Limiting Immigration.

Another possibility is that the zone of interests protected by the statutory provisions invoked in the complaint includes the interest that legal residents throughout the United States may have in preventing immigration-related unemployment and stresses on the provision of government services. But the widespread nature of this alleged interest, indeed its near

universality, suggests to us a negative answer to *Clarke's* question whether Congress intended that persons having the interest should be "heard to complain" in federal court of alleged interferences with it. 479 U.S. at 399. The injury (if any) to a citizen qua citizen from admission of an alien is an injury common to the entire population, and for that reason seems particularly well-suited for redress in the political rather than the judicial sphere. Small-scale violations of the law are unlikely to do much harm, and large-scale ones are likely to be picked up by the political process. As the Supreme Court said in *Warth v. Seldin*, 422 U.S. 490, 498 (1975), "In essence the question of standing is whether the litigant is entitled to have the *court* decide the merits of the dispute or of particular issues.... In both [its constitutional and its prudential] dimensions [standing doctrine] is founded in concern about the proper--and properly limited--role of the courts in a democratic society." (Emphasis added.) See also *id.* at 508 n.18 ("[C]itizens dissatisfied with provisions of [particular] laws need not overlook the availability of the normal democratic process.") Where the question is whether Congress intended to grant a right to a particular class of individuals to enforce a statute or other provision of law in federal court, the near-universality of the class at least hints at a negative answer.

This is of course not to say that Congress is *unable* to enact statutes enforceable by any member of the public. As long as the requirements for Article III standing are met, Congress may permit suit by persons who would otherwise be barred by prudential standing requirements. *Warth*, 422 U.S. at 501. And, although the Article III requirements will *not* be met if the alleged injury is to an abstract or generalized interest, such as the interest in the proper operation of government, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992); *Allen v. Wright*, 468 U.S. 737, 760

(1984), they may be satisfied even though the alleged injury is widespread or universal, so long as it is concrete, see *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669, 686-88 (1973). The question under the zone-of-interests test of § 702 is simply whether the language of the statutes invoked by the plaintiff or the supporting legislative history suggests a congressional intent to permit the plaintiff's suit.

Apart from the near-universal character of the asserted interest of citizens qua citizens in assuring that employment opportunities are not impaired and public services and facilities not overburdened, we see little that pushes us one way or the other in discerning whether Congress intended to permit suit by members of this broad class. As the Federation's counsel stated in oral argument, "[i]f it is not to protect the people who live in the few communities where immigrants tend to settle, it would be hard to know for whose benefit those limitations were enacted, *because Congress never mentions anybody else*." (Emphasis added). We have already seen that Congress failed to mention citizens living in immigration-impacted areas in any relevant connection, so we are left facing something of a vacuum. We do not believe that an affirmative signal of Congressional intent to permit a suit is *required* for a finding of prudential standing; a different conclusion would be difficult to reconcile with the Court's statement in *Clarke* that "[t]he [zone-of-interests] test is not meant to be especially demanding; in particular, there need be *no indication of congressional purpose to benefit* the would-be plaintiff." 479 U.S. at 399-400 (emphasis added). But we have also held that the absence of a clear indication of congressional intent to *forbid* the suit does not automatically confer standing on the plaintiff. *National Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1052 (D.C. Cir. 1989) (explicitly rejecting

idea that parties "have standing unless the statutes or their legislative histories reveal a congressional intent to preclude reliance on this particular class of plaintiffs").

The immigration context suggests the comparative improbability of any congressional intent to embrace as suitable challengers in court all who successfully identify themselves as likely to suffer from the generic negative features of immigration. If it were likely that the Immigration and Naturalization Service might be subjected to acute pressure from powerful pro-immigration interest groups, a congressional contemplation of universal litigative champions would perhaps be a likely inference. But in fact the people most directly affected by the agency's behavior, the would-be immigrants, are exceptionally ill-placed to mount such pressures. Environmental legislation is a sharp contrast. Although it often has champions who have near-universal interests (breathing clean air, for example), it also works in an area with obvious and powerful domestic interest groups, the regulated firms, which Congress might fear as a source of distorting influence over the relevant agencies. In that context, the inference that Congress contemplated universal champions seems far more reasonable.

Moreover, we do not understand the Federation's concept of its members' injury to be at all analogous to the injury suffered by a broad public as a result of an increase in air pollution--each extra particle (or alien) causing a marginal increase in hazard. The Federation makes no such zenophobic suggestion, which in any event we would be most reluctant to impute to Congress as the injury it sought to avert (and thus the obverse of the interest to be protected). Rather, the injury asserted appears no different from the crowding effect that might be expected from any abrupt surge in the adult population. And under that view the injury is as diffuse as can be imagined. It is, for example, suffered

even by those Cuban immigrants who would secure entrance to the United States if the program attacked by the Federation were dismantled. The asserted injury is thus borderless and universal in a way that even environmental injury is not.

Here, without either a clear indication of congressional intent or any obvious tie-breaking rule, we infer from the universality of the proposed class of plaintiffs and the above characteristics of the immigration context that Congress did not intend to permit suit in federal court by all members of the proposed class.

Employment-based Interest in Limiting Immigration.

In *International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798 (D.C. Cir. 1985), we held that domestic workers fell within the zone of interests of INA § 212(a)(4), 8 U.S.C. § 1182(a)(14), which specifically excluded from the United States "alien workers whose entry "will ... adversely affect the wages and working conditions of the workers in the United States similarly employed.' " *Bricklayers*, 761 F.2d at 804 (quoting 8 U.S.C. § 1182(a)(14)). The Federation suggests, as an alternative to its primary arguments, that under *Bricklayers* a narrowed class of prospective plaintiffs, including only those persons for whom more immigration may imply a prospect of increased competition in the job market—and thus a lower wage or an increased risk of unemployment—falls within the zone of interests of the statutory provisions named in the complaint.

The INA contains various numerical limits on immigration. E.g., 8 U.S.C. § 1153. At least in some instances, these limits reflect a clear concern about protecting the job opportunities of United States citizens. A clear example is § 1153(b)(3)(A), which restricts visas for various types of workers to individuals capable of performing work for which "qualified workers are not available in the United

States." Assuming that the Federation's members fall within the zone of interests of the numerical limit provisions, and thus would have prudential standing to complain of direct violations of those provisions, it does not follow that they have standing to complain about violations of the statutory provisions they in fact assert. See *National Wildlife Fed'n*, 497 U.S. at 883.[1] If a plaintiff were permitted to bring a claim for violation of a particular statutory provision whenever he or she came within the zone of interests of some provision contained within the same act, the zone-of-interests test could be "deprive[d] ... of virtually all meaning." *Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 529-30 (1991).

In applying the zone-of-interests test, we do not look at the specific provision said to have been violated in complete isolation. In Clarke the Court looked not only to the provision allegedly violated but also to one to which it was an exception. 479 U.S. at 401-02. And in *Bricklayers* we found that labor unions had standing to challenge the admission of aliens classified as "B-1's" on the ground that their admission violated the limits on use of "H-2" visas, where both of the relevant statutory provisions appeared in a common subsection of the INA, § 101(a)(15), and concerned the same subject matter, entry specially for work purposes. 761 F.2d at 804-05. But in *Air Courier* the Supreme Court emphasized that it would look only to provisions having an "integral relationship" with the provisions under which the suit was brought. 498 U.S. at 530. It thus refused to permit labor unions to challenge the "Postal Express Statutes" (governing use of private mailing services) on the basis of

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[1] The Federation's complaint does refer to (unspecified) "numerical limits" on immigration, but we do not read the complaint to allege a claim for relief for violation of § 1153 or any similar provision.

certain labor-management provisions--within whose zone of interests the unions presumably fell--contained in the same piece of legislation, the Postal Reorganization Act. *Id.* "None of the documents constituting the [Act's] legislative history suggest that those concerned with postal reforms saw any connection between the [Postal Express Statutes] and the provisions of the [Act] dealing with labor-management relations." *Id.*

The numerical limits in the INA do not seem to have the sort of "integral relationship" with the parole, nationality-preference, and visa-eligibility provisions invoked by the Federation that would permit the numerical limits to be considered in establishing standing for the Federation's members. Of course every immigration provision is in a broad sense part of the framework of every other provision. But if that were enough, then *every* provision constraining the admission of anyone under any circumstances (including any provision *allowing* the admission of anyone, for all such permissive provisions necessarily have their limits) would be pertinent in applying the zone-of-interests test to *any* provision. This does not seem the sort of relationship the Supreme Court had in mind in *Air Courier*.

* * *

Because Congress, in the various immigration provisions that the Federation says have been violated, did not seek to protect the interests of the Federation's members by intending them as beneficiaries or as suitable challengers of violations, the judgment dismissing the complaint is

Affirmed.

ROGERS, *Circuit Judge*, *dissenting*: The Federation for American Immigration Reform, Inc. ("FAIR") has brought suit in federal district court seeking declaratory and injunctive relief for alleged violations of the Immigration and Nationality Act ("INA") by the Attorney General. In

accordance with a joint communique issued by the governments of the United States and Cuba on September 9, 1994, the Attorney General announced a policy of paroling a substantial number of Cubans into the United States each year and, after one year's presence in the United States, adjusting their status to permanent residents.[1] FAIR's complaint alleges that the Attorney General's parole program for special Cuban migrants exceeds her authority under the parole provision, INA § 212(d)(5)(A), 8 U.S.C. § 1152(d)(5)(A) (1994), the Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161, 1161 (1966), *as amended by* Pub. L. No. 96-212, § 203(i), 94 Stat. 102, 108 (1980), *reprinted as* 8 U.S.C. § 1255 note (1994), and several other provisions of the INA. The court concludes that FAIR's members are not within the "zone of interests" of the immigration statutes and affirms the dismissal of the complaint. Because I conclude that FAIR has standing and its complaint does not present a non-justiciable political question, I respectfully dissent.

I.

Prudential standing. In its complaint, FAIR asserts that the limits on immigration in the INA "were enacted by Congress to protect U.S. citizens and previously admitted immigrants from the adverse effects of immigration in excess of the absorptive capacity of the nation and of the communities where the immigrants settle." Cmplt. ¶ 26. Viewing the question as "whether the language of the

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[1] The United States government has undertaken in its agreement with Cuba to admit a minimum of 20,000 Cubans into the United States each year, not including immediate relatives of United States citizens. The government has estimated that about 3,000 Cuban migrants would arrive as immigrants, about 7,000 as refugees, and about 10,000 as parolees. Statement of Doris Meissner, Commissioner of the Immigration and Naturalization Serv., transcript at 15 (Sep. 9, 1994).

statutes invoked by the plaintiff or the supporting legislative history suggests a congressional intent to permit the plaintiff's suit," Majority Opinion ("Maj. Op.") at 8, the court "sees little that pushes us one way or the other in discerning whether Congress intended to permit suit by members of this broad class." Maj. Op. at 8. The court concludes that the "near-universality" of the injury operates as a "tie-breaking rule" indicating that FAIR's members are not within the zone of interests. Maj. Op. at 10. In conducting the zone-of-interests inquiry in this manner, the court ignores express instruction from the Supreme Court and fashions a new standard without any previous support.

In *Clarke v. Securities Industries Association*, 479 U.S. 388, 399-400 (1987), the Court articulated the zone-of-interests test in the following terms:

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right to review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

In an accompanying footnote, the Supreme Court declared that the approach taken by the D.C. Circuit in *Control Data Corp. v. Baldridge*, 655 F.2d 283, 293-95 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981) (requiring a positive showing, albeit only "slight," of congressional intent to benefit the class of which the plaintiff is a member), was "inconsistent

with our understanding of the "zone of interest' test, as now formulated." 479 U.S. at 400 n.15. As the court notes, Maj. Op. at 8-9, the presumption of reviewability of agency action under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA"), can be overcome not only by express statement in the statute or its legislative history that Congress did not intend to permit suit by a particular class of plaintiffs, but also if the plaintiff's interest is "in fact inconsistent with the animating purpose" of the statute. *National Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1043-44 (D.C. Cir. 1989), *cert. denied*, 496 U.S. 936 (1990). On the other hand, if the plaintiff is a "suitable challenger" in the sense that its "interests, while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests," then the plaintiff is permitted to bring suit. *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922-23 (D.C. Cir. 1989).

The issue is whether FAIR falls within the zone of interests of the limitations on the Attorney General's authority to grant parole, not the zone of interests of the permissive aspect of the parole authority. When a plaintiff "challenges [a] program as *ultra vires*," the court should ask whether the "statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (opinion of Bork, J.). The INA imposes limits on the overall number as well as on the characteristics of immigrants to the United States. INA §§ 201-203, 8 U.S.C. §§ 1151-1153 (1994). When the parole provision was first adopted in 1952, the Report of the House Committee on the Judiciary explained that the INA established "strict qualitative tests" for admission, and "any discretionary authority to waive the grounds for exclusion

[by parole] should be carefully restricted to those cases where extenuating circumstances clearly require such action and ... the discretionary authority should be surrounded with strict limitations." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1705. In other words, the "strict limitations" on the Attorney General's parole authority implement the INA's overall limits on immigration.[2]

When Congress abolished the national quota system in 1965 and set an overall numerical limitation on immigration, with a system of "preferences" for immigrants meeting certain qualifications, the Report of the Senate Committee on the Judiciary explained that the "limit will permit immigration within what is believed to be the present absorptive capacity of this country." S. REP. NO. 748, 89th Cong., 1st Sess. 14, *reprinted in* 1965 U.S.C.C.A.N. 3328, 3332. These limits on immigration are obviously intended to benefit current residents of the United States. *Cf.* S. REP. NO. 132, 99th Cong., 1st Sess. 3 (1985) ("[W]e believe that the formulation of U.S. immigration policy must involve a

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[2] The court concludes, Maj. Op. at 10-12, that the parole provision does not have an "integral relationship" with the limitations on immigration in INA §§ 201-203, 8 U.S.C. §§ 1151-1153. *Cf. Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 530 (1991). I agree that it does not avail FAIR to be within the zone of interest for specific limitations on immigration that are not at issue, such as the limits on immigrants capable of performing labor for which qualified workers are unavailable in the United States, INA § 203(b)(3), 8 U.S.C. § 1153(b)(3). On the other hand, the Attorney General's parole authority does bear an "integral relationship" to the limitations on immigration as a whole. Just as in *Clarke*, in which the section of the statute under which the plaintiff sought relief was "a limited exception to the otherwise applicable requirement" of another section of the statute, 479 U.S. at 401, the Attorney General's parole authority is a limited exception to the general restrictions on immigration.

judgment of what would promote the interests of American citizens...."). Congress has arrived at these limits on immigration by weighing "both the economic and noneconomic impacts of immigration." *Id.* at 4.[3]

The court does not explain why FAIR would not be a "suitable challenger" to bring a claim that the Attorney General has acted beyond her parole authority. FAIR's interest in limiting immigration so as to prevent what it considers to be the adverse economic impacts of immigration coincides with one of Congress' implicit purposes in enacting limitations on the Attorney General's parole authority. Hence, FAIR's interest is not "marginally related to or inconsistent with the purposes implicit in the statute." *Clarke*, 479 U.S. at 399.

The court provides no authority for its proposition that the "near-universal character of [an] asserted interest" overcomes the presumption of reviewability under the APA. Maj. Op. at 8. As the court acknowledges, Maj. Op. at 7, FAIR does not present a mere generalized grievance, "claiming only harm to [its] and every citizen's interest in proper application of the ... laws." *Lujan v. Defenders of Wildlife*, 504 U.S. at 573; *see also Warth v. Seldin*, 422 U.S. 490, 499, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). Rather, FAIR alleges imminent injury to its members' concrete and particularized interest in job opportunities and local public services. *See infra* Part II. Although FAIR's members' injury-in-fact is particular, FAIR's asserted legal interest is general--indeed, everyone resident in the United States is protected by the INA from what Congress considers to be the harms from

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[3] Senate Report No. 132 accompanied the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. The quoted passages can also be found in identical form in a Senate report from the previous Congress accompanying a similar bill that was not enacted into law. S. REP. NO. 62, 98th Cong., 1st Sess. 3-4 (1983).

over-immigration. In the same manner, everyone is protected by laws governing the preservation of national parks, only those persons concretely affected by the over-development of such a park suffer the injury-in-fact necessary for constitutional standing.[4] *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972). To take other examples, the legal interest of groups like voters and television viewers are similarly held by almost the entire populace, yet such groups are within the zone of interests of certain statutes. *See, e.g., Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). "[T]he fact of [injury-in-fact] is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate." *Sierra Club*, 405 U.S. at 737. There appears no reason to conclude from the generality of the legal interest that FAIR asserts that FAIR's members do not fall within the relevant zone of interest.

II.

I address briefly the defendants' remaining arguments for why FAIR's claims are non-justiciable, which rely on constitutional standing concerns and the political-question doctrine.[5]

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[4] The court distinguishes the application of the zone-of-interests test to environmental statutes on the ground that anti-conservation groups are politically more powerful than pro-immigration groups. Maj. Op. at 9. Standing to sue, however, does not depend on the likelihood of agency "capture" by opposed interest groups. FAIR's members fall within the zone of interests of the limitations on the Attorney General's parole authority regardless whether she acts out of her sense of the public interest or at the behest of interest groups favoring Cuban immigration.

[5] In addition, the defendants contend that the federal courts lack jurisdiction over FAIR's claims because they fall within the exceptions to

Constitutional standing. A plaintiff presents a justiciable "case or controversy" under Article III only if the plaintiff meets three constitutional standing requirements. First, the plaintiff 's "injury in fact" must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; second, that injury must be fairly traceable to the defendant's conduct; and third, the judicial relief requested must be likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted).

FAIR alleges in its complaint that, according to INS statistics, 75% of Cuban immigrants in 1991 to 1993 stated that they intended to settle in the Miami area. FAIR recites that, between 1970 and 1990, the foreign-born population of the Miami area increased by 568,000, whereas the native-born population increased by only 100,000. Based on the experiences of FAIR's members with past immigration, FAIR contends that its members who reside in the Miami area will suffer harm in four respects: (1) their children's public schools will become even more overcrowded; (2) local public medical facilities will become even less efficient and accessible; (3) local police protection will be even further diluted; and (4) employment opportunities will be even further diminished. In each instance, FAIR has

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judicial reviewability under § 10 of the APA for when "statutes preclude judicial review" and when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Reviewability under the APA is generally not a jurisdictional matter but rather a question of "whether a cause of action exists." *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). The district court granted the defendants' motion to dismiss for lack of jurisdiction under Rule of Civil Procedure 12(b)(1) and denied as moot defendants' motion to dismiss for failure to state a claim under Rule 12(b)(6). In this dissenting opinion I need address the issue of standards permitting judicial review only in connection with the political question doctrine. *See infra*.

provided specific examples of alleged injuries of this nature suffered by its members.

At the pleading stage, FAIR has sufficiently alleged injury in fact.[6] *See Lujan v. Defenders of Wildlife*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice...."). Its claimed injuries are quite concrete, and they are particularized because they are confined to the Miami area. Although FAIR's allegations of injury draw on experience from past Cuban migration, "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *see also International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 803 (D.C. Cir. 1985). Of course, the alleged injuries to the Miami area from the special Cuban migrant program may never occur, *cf.* David Card, *The Impact of the Mariel Boatlift on the Miami Labor Market*, 43 INDUS. & LAB. REL. REV. 245 (1990), and the defendants may contest FAIR's showing of injury in fact at the summary-judgment stage.[7]

The district court concluded that FAIR could establish neither causation nor redressability. First, the court reasoned that "there are simply too many independent variables in the chain of causation linking defendants' actions with plaintiff's injuries." *Federation of Am. Immigration Reform v. Reno*,

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[6] The defendants maintain, citing *Tennessee Power Co. v. TVA*, 306 U.S. 118, 137 (1938), that the injuries suffered by FAIR's members are not legally cognizable. The legal-interest test, however, was laid to rest by the Supreme Court in 1970. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

[7] The defendants assert that the parolees in the Cuban parole program will have different characteristics from past Cuban immigrants. If that is so, the defendants will have the opportunity to establish that fact at summary judgment.

897 F. Supp. 595, 604 (D.D.C. 1995). The court pointed in particular to the uncertainty whether the Cuban migrants will choose to settle in the Miami area and to the possibility that "plaintiff's injuries could be abated by actions of the political branches of the Florida government." *Id.* Second, the court denied that the relief sought would redress FAIR's members' injuries because the defendants could admit the Cuban migrants into the United States through alternative methods that would result in the same injuries. Alternatively, if the defendants were unable to fulfill their obligations under the joint communique, the Cuban government might react by lifting emigration restrictions, which could potentially result in even greater injury to FAIR's members. *Id.* at 605.

In deciding whether the injury caused by the migration of Cubans to the Miami area is fairly traceable to the defendants' actions, the court must ask whether "the third party's conduct is sufficiently dependent upon the incentives provided by the defendant's action." *Wilderness Soc'y v. Griles*, 824 F.2d 4, 17 (D.C. Cir. 1987). When a defendant's action is "the primary factor enabling" the third-party action harmful to the plaintiff, the causation element of standing is satisfied.[8] *Id.* Under *Griles*, the defendants' (allegedly unlawful) admission of the special Cuban migrants into the United States is the "primary factor enabling" them to settle in the Miami area: without the defendants' actions, none of the special Cuban migrants would enter the country.[9] The

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[8] The district court relied on our decision in *Von Aulock v. Smith*, 720 F.2d 176, 180-85 (D.C. Cir. 1983). In that case, the court denied standing because it concluded that third parties would have taken the identical actions regardless of the defendant's conduct. *Von Aulock* is distinguishable because the special Cuban migrants would not enter the United States but for the defendants' parole program.

[9] Recently, in *Florida Audubon Society v. Rubin*, __ F.3d ___, (No. 94-5178, D.C. Cir. Aug. 20, 1996, in banc), in which the plaintiffs

speculative possibility that local governments might alleviate the injuries to FAIR's members is not germane to the standing inquiry; FAIR's chain of causation does not rely upon any actions to be taken by local governments, and FAIR is not required "to negate the kind of speculative and hypothetical possibilities suggested." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978).

FAIR also satisfies the redressability element of standing. The defendants now contend, curiously, that declaratory and injunctive relief against the Cuban parole program would be ineffectual because the government could simply admit the Cuban migrants through alternative, lawful means. By contrast, the Principal Deputy Assistant Secretary of State for Inter-American Affairs, declared under penalty of perjury to the district court that "[w]ithout the use of section 212(d)(5)(A) of the INA, it would be virtually impossible for the United States to comply with its legal obligations under the September 9 migration agreement." Declaration of Michael Skol ¶ 10 (Jan. 30, 1995). In its complaint, FAIR alleges that "the Defendants cannot lawfully admit [the special Cuban migrants] into the United States." Cmplt. P 38. Because, the court must accept FAIR's allegations as

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sought to set aside a rulemaking granting a tax credit to a certain ethanol-fuel mixture because the Secretary of the Treasury prepared an environmental impact statement assertedly required under the National Environmental Policy Act of 1969, the court concluded that the plaintiffs lacked standing "both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury." Assuming the validity of the court's conclusion in that case, *but see id.* at 1 (Rogers, J., dissenting), however, the causal relationship that FAIR alleges is more direct than in the case of a tax incentive, and the pattern of past Cuban migration to the Miami area makes it highly likely that many of the special Cuban migrants will settle there. Furthermore, the instant case remains at the pleading stage.

true, *Warth v. Seldin*, 422 U.S. 490, 501, (1975), and the defendants identify no alternative legal procedure for admitting the special Cuban migrants, FAIR's members' alleged injuries are redressable by the judicial relief that FAIR requests. The defendants' assertion that judicial relief would be unavailing because the Cuban government would take actions that would lead to even larger numbers of Cubans coming to the United States is speculative and is belied by current United States policy, which is to interdict Cuban refugees at sea and not allow them to enter the United States. *See* The President's News Conference (Aug. 19, 1994), 30 WEEKLY COMP. PRES. DOCS. 1682, 1683 (Aug. 22, 1994).

Political question doctrine. To identify non-justiciable political questions, the court must ask:

> "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?"

Ramirez v. Arellano v. Weinberger, 745 F.2d 1500, 1511 (D.C. Cir. 1984) (en banc) (quoting *Goldwater v. Carter*, 444 U.S. 996, 998 (Powell, J., concurring in the judgment)); *see also Baker v. Carr*, 369 U.S. 186, 217 (1962).

The sensitive immigration context in which FAIR's claims arise counsels caution, but not complete judicial abnegation of jurisdiction. There is no "textually demonstrable constitutional commitment of the issue to a coordinate political department," as would be required to conclude that FAIR's complaint presented a political question. *Baker v. Carr*, 369 U.S. at 217. As this court stated in *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987):

> The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

See also Ukrainian-American Bar Ass'n, Inc. v. Baker, 893 F.2d 1374, 1380 (D.C. Cir. 1990) (concluding that a First Amendment challenge to the government's asylum procedures did not present a political question). Despite the sovereign character of immigration decisions, *see Fiallo v. Bell*, 430 U.S. 787, 792 (1977), they are subject to judicial review.

The district court ruled correctly that FAIR's claims did not present a non-justiciable political question. 897 F. Supp. at 601-03. As the district court noted, the Supreme Court's decision in *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), "is remarkably similar to the instant case." 897 F. Supp. at 603. In *Japan Whaling*, the United States entered into an executive agreement with the government of Japan regarding whale-harvesting quotas, and the plaintiffs challenged the Secretary of Commerce's failure to "certify" Japan under a statute providing for penalties against nations that did not comply with more restrictive quotas. The Supreme Court rejected the government's contention that the case presented a political question, stating that "the challenge to the Secretary's decision not to certify Japan ... presents a purely legal question of statutory interpretation." 478 U.S. at 230. The plaintiffs in both cases claim that the Executive Branch, pursuant to an executive agreement with a foreign nation,

violated a congressional statute.[10] The interpretation of § 212(d)(5)(A) of the INA is well within the area of judicial expertise.

Because FAIR's complaint raises only statutory questions, there are "judicially discoverable and manageable standards for resolving it," *Baker*, 369 U.S. at 217, in the text of the statute itself, as well as in accompanying regulations adopted by the Attorney General, 8 C.F.R. § 212.5 (1996). Admittedly, the scope of judicial review is limited: "The unusually broad Congressional power over the admission of aliens into the United States is reflected in the narrow construction by courts of their own power to review the discretionary decisions of the Attorney General made pursuant to authority delegated to him [or her] by Congress." *Bertrand v. Silva*, 684 F.2d 204, 212 (2d Cir. 1982); *see also Jean v. Nelson*, 727 F.2d 957, 976-77 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 472 U.S. 846 (1985). But even though "the Attorney General has broad discretion to grant or deny parole," that discretion "is not unlimited." *Moret v. Karn*, 746 F.2d 989, 991 (3d Cir. 1984). Therefore, FAIR's complaint does not present any non-justiciable political questions.

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[10] The defendants attempt to distinguish *Japan Whaling* on the ground that the plaintiffs in that case sought a writ of mandamus, whereas FAIR seeks a prohibitory injunction under the APA. This is a distinction without significance, as far as the political question doctrine goes; if anything, the less intrusive nature of the relief that FAIR seeks makes its claims even less problematic.

Accordingly, I would reverse and remand the case to the district court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Decided August 23, 1995 Filed August 23, 1995

Civil Action No. 94-2459 (JHG)

FEDERATION FOR AMERICAN IMMIGRATION REFORM, INC.,
PLAINTIFF,

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
DEFENDANTS.

For FEDERATION FOR AMERICAN IMMIGRATION REFORM, INC., plaintiff: *Kenneth George Starling, William Waddington Chip*, SUTHERLAND, ASBILL & BRENNAN, Washington, DC.

For JANET RENO, Attorney General of the United States, DORIS MEISSNER, Commissioner, U.S. Immigration and Naturalization Service, defendants: *Donald Eugene Keener*, U.S. DEPARTMENT OF JUSTICE, Civil Division, Washington, DC.

Before: JOYCE HENS GREEN, *United States District Judge.*

Opinion By: JOYCE HENS GREEN

MEMORANDUM OPINION AND ORDER

To end the massive flow of Cuban nationals fleeing Cuba in makeshift boats for the United States in the summer of 1994, the governments of the United States and the Republic

of Cuba signed the United States-Cuba Joint Communique Concerning Normalizing Migration Procedures ("Joint Communique") on September 9, 1994. The Joint Communique provides for the migration of at least 20,000 Cubans per year into the United States in exchange for Cuba's promise to patrol its borders to prevent unauthorized departures.

Plaintiff, Federation for American Immigration Reform, Inc. ("FAIR"), instituted this action against defendants, Janet Reno, Attorney General of the United States, and Doris Meissner, Commissioner of the United States Immigration and Naturalization Service ("INS"), claiming that several of the methods defendants will utilize to meet the 20,000 person threshold violate federal immigration law. Defendants have moved to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Because plaintiff lacks standing, defendants' Rule 12(b)(1) motion is granted and this case is dismissed.

I. Background

A. The Parties

FAIR is a nonprofit, tax-exempt, charitable and educational membership organization founded in 1978. Its objectives include improving the enforcement of laws against illegal immigration and ensuring levels of legal immigration that are consistent with the capacity of the areas in which immigrants typically settle to absorb them. To achieve these ends, FAIR studies the economic, environmental, and social consequences of immigration into the United States. The results of its studies, as well as other information regarding national immigration policy, are disseminated to its members, educational institutions and policymakers.

Significant to the instant case, FAIR has approximately 1400 dues-paying members in the Miami-Hialeah Primary Metropolitan Statistic Area ("Miami PMSA"), which is

coextensive with Dade County, Florida, and includes the cities of Miami, Miami Beach and Hialeah. The INS has estimated that 75% of all Cuban immigrants in fiscal years 1991-93 intended to settle in the Miami PMSA.

As Attorney General of the United States, Janet Reno is responsible for administering and enforcing all "laws relating to the immigration and naturalization of aliens", 8 U.S.C. § 1103(a), and is authorized to "parole" aliens temporarily into the United States "for emergent reasons or for reasons deemed strictly in the public interest", 8 U.S.C. § 1182(d)(5). Doris Meissner, the Commissioner of the INS, must perform any responsibilities relating to immigration delegated to her by the Attorney General, 8 U.S.C. § 1103(b), and is charged with the responsibility of collecting and disseminating information related to immigration. 8 U.S.C. § 1103(c). Both defendants are sued in their official capacities.

B. Factual Background

The United States annually welcomes tens of thousands of refugees from around the world. Nonetheless, it discourages mass economic migration on unseaworthy vessels to reach its shores and does not open its borders to migrants who do not qualify for refugee protection. Testimony of INS Commissioner Meissner before the House Judiciary Committee Subcommittee on International Law, Immigration and Refugees (October 5, 1994) [hereinafter "Meissner Testimony"], attached at Tab 1 to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1), at 22-23. The year 1994 presented extraordinary challenges to these policies.

In the spring, large numbers of Haitians fled the deplorable conditions in Haiti on makeshift boats and rafts to seek entry into the United States. In May 1994, President Clinton ended the policy of direct repatriation of Haitians found at sea. He instituted a new policy effective June 16

whereby Haitians were screened for refugee status on United States Coast Guard ships or in other countries. In July, further new procedures were implemented through which Haitians were offered temporary protection in safe haven camps. The cessation of air links between the United States and Haiti in early August restricted the processing of refugees in Haiti, but the United States has continued to assist Haitian refugees who fear persecution in their homeland. *Id.* at 22-25.

Also in August, the Cuban government announced that it would no longer forcibly prevent emigration from Cuba by boat. *Id.*; *see also Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995). This announcement exacerbated an already irregular and highly unsafe pattern of migration that has existed between Cuba and the United States since Fidel Castro rose to power in Cuba 35 years ago. Throughout this period, Cubans who do not qualify for "in-country" refugee processing,[1] have regularly set sail on the open seas for the southeast coast of the United States.

These voyages are almost always made on overcrowded, substandard boats or homemade rafts and frequently end in disaster. The reward for those who successfully evade the Cuban boat and shore patrols, however, was that the United States did not return these would-be refugees to Cuba. The United States brought Cubans rescued at sea into this country, where they were paroled and issued work authorization. Any Cuban who was "paroled in the United States could file for asylum or apply for adjustment of status

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[1] The United States offers channels for legal immigration for Cuban nationals. Since 1987, there has been a refugee processing program within the confines of Cuba for political prisoners, human rights activists, dissidents, and members of persecuted religious minorities. Meissner Testimony at 25.

to lawful permanent resident after one year as provided in the Cuban Adjustment Act of 1966." Meissner Testimony at 26.

The August 1994 announcement by the Cuban government prompted a massive flow of Cuban nationals toward the United States. It is estimated that 40,000 Cubans attempted the perilous journey across the Florida straits in August and September of 1994.[2] Not since the Mariel boatlift in the early 1980's had Cubans fled in such numbers.[3] Of these would-be refugees, approximately 8000 arrived safely in the United States; about 32,000 were rescued at sea by United States military vessels; several hundred were lost at sea.

Effective August 19, the United States changed its policy with regard to Cuban migrants. Cubans rescued at sea were barred from entering the United States.[4] Instead, they were to be transported to such safe havens as the Guantanamo Bay Naval Station or Panama where they could remain, return to Cuba or seek lawful entry into a country other than the United States. As of October 2, 1994, there were nearly 32,000 Cubans in these safe havens. Similarly, any Cuban arriving in the United States on or after August 19, 1994 was to be detained rather than immediately paroled. By mid-September, approximately 725 Cuban nationals were being held in detention facilities in the United States. *Id.* at 26.

Back in early September, officials of the United States met with representatives of the Cuban government to

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[2] For example, it has been estimated that 4100 Cubans arrived in the United States by boat or raft in calendar year 1993.

[3] *See Louis v. Nelson*, 544 F. Supp. 973, 978-79 (S.D. Fla. 1982) (subsequent history omitted) (noting that 125,000 Cubans came into the United States during the spring of 1980); *Pollgreen v. Morris*, 496 F. Supp. 1042 (S.D. Fla. 1980) (subsequent history omitted).

[4] The Attorney General did grant humanitarian parole to infirm or elderly people as well as unaccompanied minors.

negotiate an end to this crisis. The result of these negotiations was the Joint Communique, signed on September 9, 1994, in which the two countries recognized their "common interest in preventing unsafe departures from Cuba which risk loss of human life." Joint Communique, attached at Tab 7 to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1), at 1. The Joint Communique committed the Cuban government to "take effective measures in every way it possibly can to prevent unsafe departures". *Id.* By December, the emigration virtually ceased.

The Joint Communique emphasized the two countries' desire "to direct[] Cuban migration into safe, legal and orderly channels". *Id.* The United States will strive to achieve this goal in a number of ways. It will continue its policy of issuing visas to immediate relatives of United States citizens, which will result in between 500 and several thousand Cuban nationals being lawfully admitted each year. The United States also agreed to permit the migration of qualified Cuban nationals on the immigrant visa waiting list as of September 9, 1994. This measure, which the Joint Communique refers to as "extraordinary", will bring an estimated 4000-6000 Cuban nationals into the United States. In addition, the United States committed "to authorize and facilitate additional lawful migration to the United States from Cuba. The United States ensures that total legal migration to the United States from Cuba will be a minimum of 20,000 Cubans each year, not including immediate relatives of United States citizens." *Id.*

Shortly after the Joint Communique was signed, the United States announced the details of how it would meet the 20,000 immigrant threshold. First, the United States will encourage earlier Cuban immigrants to become United States citizens and then petition for the admission of their relatives. These "preference immigrant visa holders" will constitute

several thousand new Cuban nationals being lawfully admitted into the United States each year. Second, the United States will admit Cuban nationals who come within the INA's definition of "refugee", 8 U.S.C. § 1157, within certain numerical limits.[5] This policy change will result in 6000-8000 new Cuban nationals in the United States lawfully.

The final new policy adopted by the United States is the special migration program for Cuban immigrants who could not otherwise be lawfully be admitted into the United States ("Special Cuban Migration Program"). These immigrants will be selected mostly by lottery from an applicant pool. Eligibility for the applicant pool is based upon such factors as language skills, job skills, education level, family ties and discrimination in Cuba.

Cubans selected under the Special Cuban Migration Program are admitted to the United States in the following sequence: (1) the INS issues documents that permit the Cuban nationals to enter and remain in the United States; (2) the Attorney General releases, or "paroles", these migrants from her custody upon their arrival and permits them to remain in the United States; (3) after one-year's residence, the migrants can apply for an adjustment of status pursuant to the Cuban Adjustment Act, Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966), 8 U.S.C. § 1255 note.

C. The Complaint

FAIR asserts that as a result of the new Cuban immigration programs, its members residing in the Miami PMSA will be confronted with overcrowded public schools, decreased access to public medical facilities, reduced police protection and diminished employment opportunities. Based

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[5] In the past, the United States had a policy of restricting refugee admissions from Cuba to political prisoners.

on these alleged injuries, it challenges a number of the methods through which defendants propose to satisfy their obligations under the Joint Communique. Specifically, it contests the Attorney General's use of her parole authority and the decision to permit the migration of qualified Cuban nationals on the immigrant visa waiting list as of September 9, 1994.

In Count I, plaintiff asserts that the use of parole to allow ineligible Cuban nationals to "enter and remain in the United States permanently" is inconsistent with the Attorney General's statutory parole authority granted by Section 212(d)(5)(A) of the Immigration and Naturalization Act ("INA"), codified at 8 U.S.C. § 1182(d)(5)(A). FAIR claims that this provision mandates that parole be temporary and that parolees are to be treated just as any other applicants for admission; FAIR also avers that Congress did not intend that parole be used to evade limits on immigration.

Count II presents plaintiff's claim that, whether or not the Attorney General is misusing her parole authority (as claimed in Count I), to permit Cuban nationals to remain in the United States based on their nationality violates Section 244A(g) of the INA, codified at 8 U.S.C. § 1254a(g). According to plaintiff, such a nationality preference can only be applied if the Attorney General declares Cuban nationals in need of "temporary protected status" because of an extraordinary and temporary condition which prevents their return to their homeland, something she has not done.

In Count III, FAIR avers that the decision to issue documentation that enables Cuban immigrants to "enter and remain in the United States permanently" is the equivalent of issuing visas to immigrants not eligible for visas pursuant to 8 U.S.C. § 101(a) (16). Count III further claims that the issuance of this documentation to Cubans contravenes 8

U.S.C. § 1152(a)(1), which prohibits the use of preferences based on, inter alia, nationality.

Finally, in Count IV, plaintiff claims that the Attorney General cannot adjust the status of paroled Cuban nationals after one-year of residence. FAIR avers that, pursuant to the Cuban Adjustment Act, the status of lawfully admitted aliens can only be adjusted if the paroled Cuban "is eligible to receive an immigrant visa." Because these immigrants are not "eligible to receive an immigrant visa", FAIR claims that their status cannot be adjusted.

II. Discussion

Presently pending are two motions to dismiss. The first asserts that this case must be dismissed for lack of subject matter jurisdiction, because the case presents nonjusticiable political questions and FAIR does not have standing. Fed. R. Civ. P. 12(b)(1).[6] The second motion avers that plaintiff fails to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6).

A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957);

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[6] A Court considering a 12(b)(1) motion can consider matters outside the pleadings without converting the motion into one for summary judgment. *See Prakash v. American Univ.*, 727 F.2d 1174, 1181 (D.C. Cir. 1984); *Riley v. Titus*, 190 F.2d 653, 655 n.1 (D.C. Cir.), *cert. denied*, 342 U.S. 855 (1951) ("A motion to dismiss for lack of jurisdiction over the subject matter is not so converted [to summary judgment] for obvious reasons. Had the court determined that it had no jurisdiction over the subject matter, dismissal rather than summary judgment would have been the proper disposition."); *see also* 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1366 at 484-85 (2d. ed. 1990) ("There has never been any serious doubt as to the availability of extra-pleading material on these [12(b)(1)-(5), (7)] motions").

Kenneda v. United States, 880 F.2d 1439 (D.C. Cir. 1989). The factual allegations of the complaint must be presumed true, *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *see 5A Charles A. Wright, et al., Federal Practice and Procedure*, § 1357, at 304 (1990 & Supp. 1995), and plaintiff is entitled to all favorable inferences which can be drawn from those allegations. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Nonetheless, "the court need not accept inferences drawn by plaintiff[] if such inferences are unsupported by the facts set out in the complaint." *Kowal*, 16 F.3d at 1276.

A. The Political Question Doctrine

The political question doctrine is "essentially a function of the separation of powers". *Baker v. Carr*, 369 U.S. 186, 217 (1962). It prevents the judicial branch from encroaching upon areas reserved to the other branches of the federal government. *See Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."). When the government moves to dismiss on political question grounds, the Court must conduct "a discriminating inquiry into the precise facts and posture of the particular case" to ensure that the lawsuit is not "a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Id.*

In *Baker v. Carr*, the Supreme Court noted that "[p]rominent on the face of any case held to involve a political question" will be:

(1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or"

> (2) "a lack of judicially discoverable and manageable standards for resolving it; or"
>
> (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, or"
>
> (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or"
>
> (5) "an unusual need for unquestioning adherence to a political decision already made; or"
>
> (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

369 U.S. at 217.

Defendants' claim that this case presents political questions is premised on cases that recognize immigration matters as "frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *see Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) ("the power to expel or exclude aliens [is] . . . largely immune from judicial control"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). Defendants assert that this authority is particularly applicable here because they acted in response to an unfolding foreign policy, immigration and humanitarian crisis.

Defendants rely primarily on the first two *Baker* factors. They argue that the constitution textually commits the question of whether the Cuban aliens may be admitted to the

legislative and executive branches. This textual commitment, defendants claim, can be found in Article I, § 8, cl. 4, which authorizes Congress "to establish an uniform Rule of Naturalization . . . ." Pursuant to this authority, both the legislative and executive branches have, indeed, created "an intricate system governing admission of immigrant and nonimmigrant aliens into the United States." Defendants' 12(b)(1) Memo. at 20.

This cannot be the kind of "textually demonstrable constitutional commitment" to which the Supreme Court referred in *Baker v. Carr*. Were this true, questions regarding immigration would always constitute political questions, and the Supreme Court has specifically noted that a judicial examination into immigration questions must be undertaken with a "narrow standard of review", *Mathews*, 426 U.S. at 81-82, not that it cannot be done at all.

Similarly, the government cannot rely on the foreign powers authority of the executive and legislative branches. Defendants' 12(b)(1) Memo. at 16 (noting that the Joint Communique "was a Presidential initiative and received Presidential approval"). It is true that "the conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative departments--'the political' departments of the government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decisions." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *see Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens"). In *Baker v. Carr*, however, the Supreme Court specifically noted that "it is error to suppose that every case or controversy which touches on foreign relations lies beyond judicial cognizance." 369 U.S. at 211; *see Flynn v. Shultz*, 748 F.2d

1186, 1190 (7th Cir. 1984). Thus, the fact that this case involves foreign relations does not, in itself, render this case nonjusticiable.

Defendants also argue that there is a lack of judicially discoverable and manageable standards. They emphasize the broad discretionary authority given the Attorney General to implement the parole program and claim that there is no basis on which this Court can gauge their actions.[7] The Court does not agree. The Attorney General has broad, but not unfettered, authority to implement the parole program. As our Court of Appeals noted in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987):

> The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

785 F.2d at 1061; *see Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir.), *aff'd*, 472 U.S. 846 (1984) (noting that the Executive's discretion regarding parole is broad but not unlimited). In fact, it is precisely because this is a challenge to the statutory boundaries of defendants' authority that this case is justiciable.

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[7] *See* 8 U.S.C. § 1182(d)(5)(A). Further, section 103 of the INA provides, in pertinent part:

> The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . . . [She] shall . . . perform such other acts as she deems necessary for carrying out [her] authority under the provisions of this Act.

8 U.S.C. § 1103.

In *Japan Whaling Association*, the Supreme Court recognized that courts have "authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." 478 U.S. at 230. In that case, several wildlife conservation groups sought to compel the Secretary of Commerce to comply with United States law and certify that Japan was in violation of international whaling agreements. The United States had previously reached an agreement with Japan that no such certification would be made if Japan complied with certain conditions. Notwithstanding the foreign policy overtones of the case, the Supreme Court ruled that it was not a political question; the case only required the Court to "determine the nature and scope of the duty imposed upon the Secretary" by law. *Id.* As Justice White remarked, "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*[8]

This is remarkably similar to the instant case. The United States has obligated itself to a foreign country and FAIR is challenging the statutory authority that defendants invoked to fulfill the United States' obligations. It is true that defendants acted in response to an imminent, unfolding international

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[8] This principle has been reinforced in this circuit. *See, e.g., Ukrainian-American Bar Ass'n, Inc. v. Baker*, 893 F.2d 1374, 1380 (D.C. Cir. 1990) ("That a claim implicates important governmental policies . . . does not necessarily mean that the political question doctrine precludes the judiciary from hearing it. . . . So long as there are . . . 'judicially discoverable and manageable standards for resolving' the dispute without intruding into the realm of discretion properly reserved to the other branches of government, the underlying issue is not itself a nonjusticiable political question."); *South African Airways v. Dole*, 817 F.2d 119, 123 (D.C. Cir.), *cert. denied*, 484 U.S. 896 (1987).

crisis that directly impacted our borders, and their actions cannot be examined in a vacuum. *See Harisiades*, 342 U.S. at 588-89 ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . . Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."); *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980). Nonetheless, these circumstances do not render an otherwise straightforward question of statutory interpretation a nonjusticiable political question. The Court will tread lightly on this sensitive matter involving foreign affairs, but must not abrogate its responsibility to interpret the law of the land. *See DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) ("whereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs"). Accordingly, defendants' motion to dismiss on the ground that this case presents nonjusticiable political questions will be denied.

B. Standing

An association, such as FAIR, can establish standing in one of two ways. It can have standing in its own right if it demonstrates an injury to itself, or, alternatively, it can have standing as a representative of its members on the basis of injuries suffered by those members. *Automobile Workers v. Brock*, 477 U.S. 274, 284 (1986). Because FAIR brings this action in its representative capacity, it must satisfy the following elements:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c)

> neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

Defendants claim that plaintiff cannot prove the first element because no FAIR member would have standing to bring this action.[9] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2136 (1992) (plaintiff bears the burden of proving standing). They argue that no FAIR member satisfies either the constitutional or prudential requirements for standing. Plaintiff, in contrast, claims that the injuries to its members--identified as an increased burden on already overcrowded public schools, overused public health facilities, overworked public safety personnel and an oversaturated job market in the Miami PMSA--satisfy the constitutional and prudential requirements for standing.[10]

1. Constitutional Standing

The constitutional elements of standing are that: (1) the plaintiff has "personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" (injury in fact); (2) the injury "fairly can be traced to the challenged action" (traceability); (3) the injury is "likely to be addressed by a favorable decision" (redressability). *Valley Forge College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 472 (1982); *Florida Audubon Soc'y v. Bentsen*, 54 F.3d 873, 877 (D.C. Cir. 1995); *Ukrainian-American Bar Ass'n, Inc. v.*

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[9] Defendants neither contest nor admit the second and third elements of associational standing. Defendants' 12(b)(1) Memo. at 27 n.8.

[10] Of course, plaintiff's factual allegations with regard to standing will be accepted as true for the purposes of this motion. *Mideast Sys. and China Civil Constr. v. Hodel*, 792 F.2d 1172, 1177 (D.C. Cir. 1986).

Baker, 893 F.2d 1374, 1378 (D.C. Cir. 1990). Defendants claim that FAIR cannot establish either traceability or redressability.[11]

Traceability examines "the relationship between the alleged unlawful conduct and the injury." *Mideast Sys. and China Civil Constr. v. Hodel*, 792 F.2d 1172, 1176 (D.C. Cir. 1986). It requires that there be a "causal connection" between the challenged action and the injury alleged in the complaint. *Defenders of Wildlife*, 112 S. Ct. at 2136. This "causal connection" does not require that the alleged injury be a certainty, but plaintiff must demonstrate that the alleged injury is "fairly" traceable to the defendants' action. *Id.*; *International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 803 (D.C. Cir. 1985).

As applied in the instant case, FAIR must assert that its members' injuries can fairly be traced to defendants' allegedly unlawful immigration plan. *See Von Aulock v. Smith*, 720 F.2d 176, 181 (D.C. Cir. 1983). This it cannot do. There are simply too many independent variables in the chain of causation linking defendants' actions with plaintiff's injuries. *Id.* ("we must exercise special care to ensure that standing is not being rested on 'injury that results from the independent action of some third party not before the court'") (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Defendants' parole plan does not require the new Cuban migrants to settle in the Miami PMSA. Although in the past Cubans migrants have settled in the Miami PMSA, this is not necessarily due to the defendants' actions. As one court noted:

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[11] Defendants state that discovery would be required before they could determine whether to challenge the first prong.

> FAIR completely ignores the common fact that Florida is a desirable place to live. Indeed, for many years there has been a constant flow of immigration into Florida from not only Cuba but also from other countries as well as from citizens of the United States.

Federation for Am. Immigration Reform v. Meese, 643 F. Supp. 983, 986 (S.D. Fla. 1986). The Cuban migrants will be given visas to enter at any port of call in the United States and can settle anywhere in the United States that they choose.

Further, even were all new Cuban migrants to settle in the Miami PMSA, plaintiff's injuries could be abated by actions of the political branches of the Florida government.[12] The state could apportion more money for school or public health facility construction and could hire more police officers. Finally, defendants' actions do not require the new Cuban migrants to have children of school age, to send their children to public, rather than private, schools, to create the need for more law enforcement personnel, or to obtain jobs that otherwise would go to FAIR members. In short, it is impossible to conclude that plaintiff's injuries can "fairly" be traced to defendants' parole plan.

The redressability requirement, although "theoretically distinct" from the traceability prong, often overlaps with it. *Mideast Sys.*, 792 F.2d at 1176. This is particularly true where, as here, the claimed injury is "future injury". *Von Aulock*, 720 F.2d at 180. Redressability examines "the relationship between the injury and the requested relief." *Id.* As with traceability, certainty is not required, *Autolog Corp.*

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[12] The United States successfully fought the State of Florida's attempt to obtain additional federal funding. *Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994).

v. Regan, 731 F.2d 25, 31 (D.C. Cir. 1984), but there must be a "substantial likelihood" that the requested remedy will redress the alleged injury. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976).

In the instant case, FAIR must allege that a judicial decision invalidating the new Cuban migration plan will abate its members' claimed injuries. *See Von Aulock*, 720 F.2d at 181. Plaintiff cannot meet this prong. FAIR does not challenge the United States' decision to admit 20,000 Cubans per year, it only challenges the methods chosen to achieve this end. Were FAIR to succeed, all it would receive is an assurance that the 20,000 Cuban nationals arriving in the United States each year would do so through "lawful" means. The public schools would be just as overcrowded, the public health facilities would be just overburdened, the police department would be just as overworked and the job market would be just as oversaturated.

In addition, were the Cuban migration program invalidated and the United States unable to satisfy its obligations under the Joint Communique, it is likely that the massive flow of Cuban nationals into the United States would resume. For example, in the first seven months of 1994, approximately 700 Cubans were rescued at sea and paroled into the United States every day. This would exacerbate many of the problems about which plaintiff complains because under defendants' programs, the Cubans admitted into the United States will be prescreened for education and job skills. Accordingly, any relief is not likely to redress FAIR's grievances.

Finally, FAIR argues that it does not have to meet either the traceability or redressability prongs because it has suffered a "procedural injury". As the Supreme Court noted in *Lujan v. Defenders of Wildlife*:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.

112 S. Ct. at 2142 n.7; *see Florida Audubon Soc'y*, 54 F.3d at 879-80 (noting that NEPA confers a procedural right). This provision, however, does not apply because the INA does not afford procedural rights to lawful United States residents, such as FAIR's members, *Fernandez v. Brock*, 840 F.2d 622 (9th Cir. 1988), and FAIR's members do not fall within the zone of interest of the immigration laws. *See INS v. Legalization Assistance Project*, 114 S. Ct. 422, 424 (O'Connor, sitting as Circuit Justice, 1993) (noting that the Immigration Reform and Control Act of 1986 "was clearly meant to protect the interests of undocumented aliens").[13] To hold otherwise would be to read a generalized citizen standing provision into the immigration laws.

2. Prudential Standing

Litigants must assert their own rights, cannot present generalized grievances and, if they sue under the APA, must fall within the zone of interests protected by the laws invoked. *Valley Forge College*, 454 U.S. at 475; *see Allen v. Wright*, 468 U.S. 737, 751 (1984). Although the Court is not

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[13] Contrary to plaintiff's contentions, *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 45 F.3d 469 (D.C. Cir. 1995), is inapplicable. The plaintiffs in that case were family members of would-be refugees. They were, therefore, clearly within the zone of interest of the INA because "in originally enacting the INA, Congress 'implemented the underlying intention of our immigration laws regarding the preservation of the family unit.'" *Id.* at 472 (quoting H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680). No such policy is implicated here.

confident that plaintiff has satisfied any of these requirements, ultimate resolution of these issues is unnecessary in light of the decisions reached above.

III. Conclusion

For the reasons noted above, it is hereby

ORDERED that defendants' motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is granted; it is

FURTHER ORDERED that defendants' motion to dismiss pursuant to Rule 12(b)(6) is denied as moot.

IT IS SO ORDERED.

August 23, 1995

JOYCE HENS GREEN

United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5369 September Term, 1996

94cvO2459

Federation for American Immigration Reform, Inc.,
Appellant

v.

Janet Reno, Attorney General of the United States
and Doris Meissner, Commissioner, U.S. Immigration
and Naturalization Service,
Appellees

BEFORE: Williams, Ginsburg, and Rogers, Circuit Judges

ORDER

Upon considerarion of appellant's petition for rehearing filed October 5, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Rogers would grant the petition.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5369 September Term, 1996

94cvO2459

Federation for American Immigration Reform, Inc.,
Appellant

v.

Janet Reno, Attorney General of the United States
and Doris Meissner, Commissioner, U.S. Immigration
and Naturalization Service,
Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judges Wald, Rogers and Tatel would grant the suggestion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:94CV02459

FEDERATION FOR AMERICAN IMMIGRATION REFORM, INC.,
PLAINTIFF,

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
DEFENDANTS.

COMPLAINT

Federation for American Immigration Reform, Inc. ("FAIR"), as the representative of its members, by its undersigned attorneys, hereby brings this action to obtain declaratory and injunctive relief against the Defendants named herein and complains and alleges as follows:

1. On September 9, 1994, officials of the United States and the Republic of Cuba signed a document entitled "Joint Communique". According to the Joint Communique, the United States (a) "ensures that total legal migration to the United States from Cuba will be a minimum of 20,000 Cubans per year, not including immediate relatives of United States citizens" and (b) "will facilitate in a one year period the issuance of documentation to permit the migration to the United States of those qualified Cuban nationals in Cuba currently on the immigrant Visa waiting list".

2. At a press conference on September 9, 1994, the Defendants announced (a) that approximately 9,000 to 10,000 Cubans could be lawfully admitted each year as

immigrants and refugees and that any difference between the number admitted lawfully and the "ensured" migration level of 20,000 Cubans per year would be achieved by "paroling" into the United States Cuban immigrants who could not be lawfully admitted as immigrants or refugees, (b) that approximately 6,000 (but as many as 19,000) Cubans who were on the "immigrant visa waiting list" because they could not yet lawfully be admitted would also be "Paroled" into the United States, and (c) that inadmissible Cuban immigrants paroled into the United States would become eligible to apply for and be adjusted to lawfully admitted status under Public Law 89-732 ("the Cuban Adjustment Act") after a presence of one year.

3. In testimony on October 5, 1994, before the Subcommittee on International Law, Immigration and Refugees of the Committee on the Judiciary of the U.S. House of Representatives, Defendant Meissner reiterated the policy announced at the September 9 press conference and stated that (1) the paroled Cuban immigrants "will be issued documentation to allow them to enter and remain in the United States permanently" and (2) their parole status would continue until they were adjusted to lawfully admitted status under the Cuban Adjustment Act.

4 In a statement released October 12, 1994, Acting State Department Spokesman Christine Shelly stated that some of the Cuban immigrants to be paroled into the United States would be selected by a "lottery".

5. The Defendants propose taking the following three actions with respect to inadmissible Cuban immigrants: (1) paroling them into the United States, (2) permitting them to remain in the United States on the basis of their Cuban nationality, and (3) adjusting them to lawfully admitted status under the Cuban Adjustment Act if they apply for such adjustment after a year's presence in the United States. Each

of these actions contravenes one or more provisions of the Immigration and Nationality Act ("INA"), as set forth in Counts 1 through 4 herein.

6. According to INS Statistical Yearbooks, 75% of all Cuban immigrants in fiscal years 1991, 1992, and 1993 intended to settle in the region of Southern Florida that is designated by the federal government as the Miami-Hialeah Primary Metropolitan Statistic Area ("the Miami PMSA"). The Miami PMSA is coextensive with Dade County, Florida, and includes the cities of Miami, Miami Beach, and Hialeah.

7. In the current fiscal year, the Defendants propose to parole approximately 6,000 (but as many as 19,000) inadmissible Cuban immigrants who were on the immigrant visa waiting list as of September 9, 1994. In addition, in the current fiscal year and in each succeeding fiscal year, the Defendants propose to parole approximately 11,000 (but as many as 20,000) inadmissible Cuban immigrants who were not on the immigrant visa waiting list as of September 9, 1994. If 75% of the paroled Cuban immigrants settle in the Miami PMSA, as documented settlement patterns indicate they will, immigration into the Miami PMSA would likely increase between 13,000 and 29,000 in the current fiscal year and between 8,000 and 15,000 in each succeeding fiscal year.

8. Since 1970 the Miami PMSA has experienced very high levels of immigration from Cuba and other countries. This very high level of immigration has caused the local population to grow more rapidly than the capacity of the local economy to provide employment to local residents, as a result of which local residents have experienced above-average unemployment rates. This very high level of immigration has also caused the local population to grow more rapidly than the capacity of local government to provide educational, medical, and police protection services to local residents, resulting in overcrowded schools, less

accessible and efficient medical services, and reduced protection from crime.

9. Members of FAIR who reside in the Miami PMSA send their children to local public schools, use local public medical facilities, rely on local police protection for their safety, and are unable to find local employment. Paroled Cuban immigrants who settle in the Miami PMSA will be entitled to local police protection and many of them are likely to seek local employment and use the local public schools and public medical facilities. The Defendants' unlawful acceptance into the United States of thousands of inadmissible Cuban immigrants who are likely to settle in the Miami PMSA therefore threatens to cause members of FAIR who reside in the Miami PMSA to suffer greater school overcrowding, decreased access to public medical facilities, reduced police protection, and diminished employment opportunities.

I.

JURISDICTION

10. Plaintiff's claims arise under (a) 8 U.S.C. §§ 1151, 1152(a)(1), 1153, 1181(a), 1182(d)(5), 1227(a)(1), 1254 a(a), and 1324(a) and (b) 5 U.S.C. §§ 551 *et seq*.

11. Jurisdiction is based on (a) 28 U.S.C. § 1331, as a civil action arising under the laws of the United States, (b) 8 U.S.C. § 1329, as a civil action arising under the INA, as amended, (c) 5 U.S.C. § 702 as a civil action arising under the Administrative Procedure Act, and (d) 28 U.S.C. §§ 2201 and 2202, as a civil action seeking, in addition to other remedies, a declaratory judgment.

II.

VENUE

12. Venue is proper in this district under 28 U.S.C. § 1391(e)(1) because the Defendants are officials of agencies

of the United States each of whose principal place of business is in the District of Columbia.

III.

PLAINTIFF

13. Plaintiff FAIR is a nonprofit corporation, organized and existing under the laws of the District of Columbia. FAIR is recognized as a tax-exempt charitable and educational organization by the Internal Revenue Service.

14. Since its founding in 1978, FAIR has studied the economic, environmental, and social consequences of immigration into the United States. FAIR disseminates the results of its studies and other information on national immigration policy to its members, to educational institutions, and to policymakers through newsletters, reports, and legislative testimony. For example, Immigration 2000 (Washington, D.C., 1992) surveys and analyzes the research findings of labor economists on the relationship between high levels of immigration and labor market conditions, while Crowding Out the Future (Washington, D.C., 1992) illustrates through text, data, and satellite imaging the ecological impact of immigration and population growth in U.S. coastal counties.

15. FAIR is guided in its work by a National Board of Advisors, many of whom have academic or professional expertise on the subject of immigration. The FAIR Board of Advisors has included in its membership former U.S. Senators and Congressmen who participated in the formulation of Congressional immigration policy and former officials of the Executive Branch who were responsible for the implementation of immigration policy, including a former U.S. Attorney General and a former Commissioner of the U.S. Immigration and Naturalization Service.

16. By petitioning Congress within the limits prescribed by the Internal Revenue Code, by commenting on proposed

immigration regulations, by litigation, and by other lawful means, FAIR has worked on behalf of its members in the Miami PMSA and elsewhere for improved enforcement of the laws against illegal immigration and for levels of legal immigration consistent with the absorptive capacity of the areas where immigrants have tended to settle.

17. FAIR has approximately 1,400 dues-paying members who reside in the Miami PMSA.

IV.

DEFENDANTS

18. Defendant Reno. Defendant Janet Reno is the Attorney General of the United States. In that capacity she is: (a) charged by 8 U.S.C. § 1103(a) with the "administration and enforcement of (the INA] and all other laws relating to the immigration and naturalization of aliens" and with a "duty to control and guard the boundaries of the United States against the illegal entry of aliens" and (b) designated by 8 U.S.C. § 1182 (d) (5) as the federal official authorized to "parole" aliens into the United States. Defendant Reno is being sued in her official capacity.

19. Defendant Meissner. Defendant Doris Meissner is the Commissioner of the Immigration and Naturalization Service ("INS") of the United States Department of Justice. In that capacity she is charged (a) by 8 U.S.C- § 1103(b) with the responsibilities and authorities in the administration of the INA and the INS that are delegated to her by the Attorney General or prescribed by the Attorney General and (b) by 8 U.S.C. § 1103(c) with collecting and disseminating information about immigration trends, the alien population, and other information "useful in evaluating the social, economic, environmental, and demographic impact of immigration laws". Defendant Meissner is being sued in her official capacity.

V.

STANDING OF PLAINTIFF

20. FAIR has standing to seek declaratory and injunctive relief because enforcement of the statutory limitations on immigration that Defendants propose to contravene is germane to FAIR's purpose and because the unlawful actions of the Defendants threaten to injure members of FAIR who reside in the Miami PMSA.

21. Population Growth. Since 1970, the Miami PMSA has experienced very rapid population growth, largely due to legal and illegal immigration. While the U.S.-born population of the Miami PMSA grew by only 100,000 persons between 1970 and 1990, the foreign-born population grew by 568,000 in the same period. The population increase resulting from legal and illegal immigration into the Miami PMSA has outstripped the capacity of the local economy to provide employment and the ability of local government to provide educational, medical, and police protection services.

22. Education. The number of students enrolled in Dade County public schools increased by 78,000 students between 1983 and 1992. Immigration accounted for substantially all (76,000) of that increase. The rapid growth in immigrant student enrollment has resulted in school overcrowding, jeopardizing the health and comfort of students within the system and diminishing their educational opportunities. According to a 1992 report of the Dade County Superintendent of Schools, the system had already tapped all available funding sources for additional school construction and could accommodate additional growth in the immigrant student population only by "reducing the updating of older facilities or by adopting alternative housing arrangements for severely overcrowded schools (*i.e.*, double sessions)". According to a September 21, 1994 report of the Florida Department of Education, the present enrollment in Dade

County public schools exceeds capacity by 60,000 students. The enrollment in over 200 of the County's 270 public schools exceeds the capacity for which those schools were built. Members of FAIR send their children to overcrowded Dade County public schools. For example, one FAIR member has two children in a Dade County public school., Each of them shares a classroom with 40 or more children. If the overcrowding continues, one of her children' s classes next year will be held in an auditorium with 100 pupils. She and other FAIR members will be injured by the increased overcrowding that is likely to result from the settlement in the Miami PMSA of thousands of unlawfully paroled Cuban immigrants.

23. Medical Care. Immigrants make extensive use of Jackson Memorial Hospital and other public medical facilities in the Miami PMSA. Illegal immigrants alone account for approximately 25% of births at Jackson Memorial Hospital. The heavy utilization of these public medical facilities by the rapidly growing immigrant population has reduced the efficiency of those facilities and their accessibility to local residents. Members of FAIR and members of their families use these local public medical care facilities. For example, a FAIR member who has relied upon the . local county health clinic for inoculations was required on his last visit to wait nearly an hour for this simple, two-minute procedure in waiting rooms that were so overcrowded and dirty that he feared infection with tuberculosis or some other contagious disease. He and other FAIR members and their families will be injured by the increased demand on local public medical facilities and the reduced efficiency and accessibility that is likely to result from the settlement in the Miami PMSA of thousands of unlawfully paroled Cuban immigrants.

24. Police Protection. The ability of local law enforcement agencies to protect residents from crime has been outpaced by the growth of (i) the native and immigrant criminal populations and (ii) the growth of the resident population requiring protection. For example, according to both the Governor of Florida and the chief of the Florida prison system, the incarceration of thousands of criminal aliens, many of them illegal immigrants, has contributed to prison overcrowding that has necessitated the early release of thousands of dangerous criminals into the community. According to the U.S. Census Bureau, the number of serious crimes per capita in the Miami PMSA increased by 14% between 1981 and 1991, compared to a 1% increase in the rest of Florida. Members of FAIR have been victims of this crime wave. For example, since 1980 one FAIR member has experienced an accelerating rate of burglaries and other crimes against his automobile and business premises in Miami and has been spending approximately $10,000 per year repairing broken doors, locks, and bars. To his knowledge, in only one case was the perpetrator apprehended. The local police have informed him that they cannot respond on a timely basis to his calls for police assistance because their resources are stretched too thin. He and other FAIR members will be injured by the further dilution of local police protection that would result from the settlement in the Miami PMSA of thousands of unlawfully paroled Cuban immigrants.

25. Employment Opportunities. Legal and illegal immigration into the Miami PMSA has greatly increased the supply of labor there. According to the U.S. Census Bureau, 194,000 workers were added to the Miami PMSA labor force between 1980 and 1990. The demand in the local economy for labor has not increased as rapidly as the supply of labor, resulting in above-average unemployment within the Miami

PMSA. According to figures published by the U.S. Bureau of Labor Statistics, the unemployment rate in the Miami PMSA was 11% less than the national unemployment rate in 1980. Thirteen years later, in 1993, it was 21% higher; in August of 1994 (the latest month for which statistics have been published) it was 31% higher. The overcrowded labor market has diminished employment opportunities for workers in the Miami PMSA, including unemployed members of FAIR. For example, one FAIR member whose employer reduced her work hours to one day per week has been looking unsuccessfully for alternative employment in the Miami PMSA for two years. Many of the workers with whom she competes for employment are immigrants. Employment opportunities for her and for other FAIR members will be further diminished by the settlement in the Miami PMSA of thousands of unlawfully paroled Cuban immigrants.

26. The INA limits the number of immigrants that may lawfully be admitted each year. These limits were enacted by Congress to protect U.S. citizens and previously admitted immigrants from the adverse effects of immigration in excess of the absorptive capacity of the nation and of the communities where the immigrants settle. FAIR members who reside in the Miami PMSA are therefore within the INA's "zone of interest".

VI.

APPLICABLE STATUTORY PROVISIONS

27. The INA, enacted in 1952, is a comprehensive statutory scheme regulating the entry of aliens into the United States. Important amendments to its provisions for admitting immigrants were made by the INA Amendments of 1965, by the Refugee Act of 1980, and by the Immigration Act of 1990. The INA, as amended, is codified in Title 8 of the U.S. Code.

28. Except for certain statutorily excepted classes, such as refugees and certain previously admitted immigrants, no immigrant may be admitted into the United States without an immigrant visa. 8 U.S.C. § 1181(a) . The INA provides that immigrants without a valid immigrant visa shall be "excluded" from admission and "shall be immediately deported". 8 U.S.C. 1182(a)(7), 1227(a)(1).

29. An immigrant visa can lawfully be issued only by a consular officer and only to an "eligible immigrant". 8 U.S.C. 101(a)(16).

30. Except for certain statutorily excepted classes, such as immediate relatives of citizens, aliens are eligible immigrants only if they are "family-sponsored immigrants", "employment-based immigrants", or "diversity immigrants". 8 U.S.C. § 1151(a). "Family-sponsored immigrants" are immigrants, such as siblings of citizens and spouses of permanent resident aliens, who bear a statutorily defined relationship to a U.S. citizen or permanent resident alien who has petitioned for their admission. 8 U.S.C. § 1153(a). "Employment-based immigrants" are immigrants with statutorily specified skills or business qualifications. 8 U.S.C. § 1153(b). "Diversity immigrants" are randomly selected immigrants who have applied for admission from certain low-admission states. 8 U.S.C. § 1153(c).

31. Except for certain statutorily excepted classes, such as immediate relatives of citizens, the number of otherwise eligible immigrants who, may be issued an immigrant visa during any fiscal year is limited. 8 U.S.C. § 1151(a). There are separate numerical limitations on the number of family-sponsored immigrant visas, the number of employment-based immigrant visas, and the number of diversity immigrant visas, as well as numerical limits on four subcategories of family-sponsored immigrants and four subcategories of employment-based immigrants. 8 U.S.C. §§

1151, 1153. Also, not more than 27% of the total number of immigrant visas that may be issued in each category in a fiscal year may be issued in any of the first three quarters of the fiscal year. 8 U.S.C. § 1151(a).

32. Immigrant visas must be issued in the same order that petitions are received. 8 U.S.C. § 1153(e). It is unlawful for the Attorney General to afford any alien a "preference or priority" or to discriminate against any alien in the issuance of an immigrant visa on the basis of nationality. 8 U.S.C. § 1152(a)(1).

33. The Attorney General is authorized to "parole" an immigrant into the United States without an immigrant visa "for emergent reasons or for reasons deemed strictly in the public interest". 8 U.S.C. § 1182(d)(5)(A). However, the alien can be paroled only "temporarily", the Attorney General must return the alien to the custody from which the alien was paroled when the purpose of parole has been served, and the Attorney General must thereafter deal with the alien "in the same manner as that of any other applicant for admission". *Id.* "The parole provisions were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law." S. Rep. No. 748, 89th Cong., 1st Sess. 17 (1965).

34. In 1966 Congress enacted the Cuban Adjustment Act, Public Law 89-732, which provides that Cuban natives or citizens who are "eligible to receive an immigrant visa" and who have beenadmitted or paroled into the United States after January 1, 1959, can apply for, and be adjusted to, the status of lawfully admitted aliens after a physical presence of one year.

35. The Refugee Act of 1980 established a separate statutory regime for the admission of refugees. The 1980

Act defined a "refugee" as any person who is outside of his country and is unwilling to return because of persecution or a well-founded fear of persecution. 8 U.S.C. § 101(a)(42). Refugee admissions are subject to a numerical limitation that, in advance of such admissions, must be fixed by the President in consultation with Congress. 8 U.S.C- § 1157(a)(2),(b).

36. The Immigration Act of 1990 amended the INA to authorize the Attorney General to grant "temporary protected status" to certain groups of aliens. 8 U.S.C. § 1254a(a). These aliens must be nationals of a foreign state who arrived in the United States prior to the Attorney General's designation of that foreign state as one having an armed - conflict, environmental disaster, or other "extraordinary and temporary condition" that prevents the safe return of aliens to that country. 8 U. S. C. § 1254a(b), (c). The INA specifies that grants of "temporary protected status" are the "exclusive authority of the Attorney General under law to permit aliens who are or may become otherwise deportable or have been paroled into the United States to remain in the United States temporarily because of their particular nationality". 8 U.S.C § 1254a(g).

COUNT ONE

37. Plaintiff repeats, realleges', and incorporates paragraphs 1 through 36 above as though fully set forth herein.

38. The Cuban immigrants whom the Defendants propose to parole into the United States are not refugees. They cannot lawfully be issued immigrant visas because they are not within any of the categories of immigrants to whom an immigrant visa can lawfully be issued or because issuance of an immigrant visa is precluded by the numerical limitations of the INA. Because they are not refugees and

cannot lawfully be issued an immigrant visa, the Defendants cannot lawfully admit them into the United States.

39. The use of parole to allow inadmissible Cuban immigrants to "enter and remain in the United States permanently" cannot be reconciled with (a) the statutory requirement that aliens be paroled "temporarily" and eventually treated like other applicants for admission or (b) the intent of Congress that parole not be used to circumvent the INA's limits on immigration.

WHEREFORE, PLAINTIFF PRAYS:

A. That this Court declare that Defendant Reno may not lawfully parole into the United States inadmissible Cuban immigrants to effectuate their migration to the United States.

B. That this Court enjoin the Defendants from paroling or accepting into the United States inadmissible Cuban immigrants to effectuate their migration to the United States.

C. That Plaintiff be awarded the costs and disbursements of this action and such other and further relief as the Court may deem just and proper, including reasonable attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

COUNT TWO

40. Plaintiff repeats, realleges, and incorporates paragraphs 1 through 36 above as though fully set forth herein.

41. Defendant Meissner has stated that the inadmissible Cuban immigrants that Defendant Reno will accept into the United States will be permitted to remain until they can be adjusted to the status of lawfully admitted aliens under the Cuban Adjustment Act.

42. Cuba has not been designated by the Attorney General as a state whose nationals may be granted "temporary protected status".

43. The aliens whom the Defendants propose to permit to remain until they can be adjusted to lawfully admitted status are a class selected on the basis of Cuban nationality.

44. Whether or not paroling inadmissible Cuban immigrants into the United States is lawful, permitting them to remain on the basis of their nationality until they can be adjusted to lawfully admitted status under the Cuban Adjustment Act contravenes 8 U.S.C. § 1254a(g).

WHEREFORE, PLAINTIFF PRAYS:

A. That this Court declare that the Defendants may not lawfully permit inadmissible Cuban immigrants who are paroled into the United States to remain in the United States on the basis of their nationality until they can be adjusted to lawfully admitted status under the Cuban Adjustment Act or for any other temporary period.

B. That this Court enjoin the Defendants from the issuance of work authorizations or the taking of any other administrative action that permits paroled Cuban immigrants to remain temporarily in the United States on the basis of their Cuban nationality.

C. That Plaintiff be awarded the costs and disbursements of this action and such other and further relief as the Court may deem just and proper, including reasonable attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

COUNT THREE

45. Plaintiff repeats, realleges, and incorporates paragraphs 1 through 36 above as though fully set forth herein.

46. The issuance of documentation enabling Cuban immigrants to "enter and remain in the United States permanently" constitutes the issuance of an immigrant visa.

47. The Cuban immigrants to whom the Defendants propose to issue such documentation are not "eligible immigrants" because they are not within any of the categories of immigrants to whom an immigrant visa can lawfully be issued or because the issuance of an immigrant visa is precluded by the numerical limitations of the INA. Because they are not "eligible immigrants", the issuance to them of documentation constituting an immigrant visa contravenes 8 U.S.C. § 101(a) (16).

48. Because the Defendants are not consular officers, the issuance by them of documentation constituting an immigrant visa contravenes 8 U.S.C. § 101(a)(16).

49. Because the only inadmissible immigrants to whom the Defendants propose to issue such documentation are Cubans, the issuance to them of such documentation contravenes 8 U.S.C. § 1152 (a) (1) , which provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence".

WHEREFORE, PLAINTIFF PRAYS:

A. That this Court declare that the issuance of documentation enabling inadmissible Cuban immigrants to "enter and remain in the United States permanently" constitutes the unlawful issuance of an immigrant visa.

B. That this Court enjoin the Defendants from issuing documentation enabling inadmissible Cuban immigrants to enter and remain in the United States permanently.

C. That Plaintiff be awarded costs and disbursements of this action and such other and further relief as the

Court may deem just and proper, including reasonable attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

COUNT FOUR

50. Plaintiff repeats, realleges, and incorporates paragraphs 1 through 36 above as though fully set forth herein.

51. The Defendants propose to parole into the United States Cuban immigrants who are ineligible to receive an immigrant visa because they are not within any of the categories of immigrants to whom an immigrant visa can lawfully be issued.

52. The Defendants propose to adjust the paroled Cuban immigrants to the status of lawfully admitted aliens under the Cuban Adjustment Act if they apply for such adjustment after a physical presence of one year.

53. The Cuban Adjustment Act provides that a paroled Cuban may be adjusted by the Attorney General to the status of a lawfully admitted alien only if the paroled Cuban "is eligible to receive an immigrant visa".

WHEREFORE, PLAINTIFF PRAYS:

A. That this Court declare that a Cuban immigrant who does not fall within any of the categories of immigrants to whom an immigrant visa can lawfully be issued cannot lawfully be adjusted to the status of a lawfully admitted alien under the Cuban Adjustment Act.

B. That this Court enjoin the Defendants from adjusting any such Cuban immigrant to the status of a lawfully admitted alien under the Cuban Adjustment Act.

C. That Plaintiff be awarded costs and disbursements of this action and such other and further relief as the Court may deem just and proper, including reasonable attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

Respectfully submitted,

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STATUTORY PROVISIONS CITED

1. Section 101(a)(16) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(16).

SEC. 101. DEFINITIONS.

(a) As used in this Act--

(16) The term "immigrant visa" means an immigrant visa required by this Act and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this Act.

2. Section 201(a) of the Immigration and Nationality Act, 8 U.S.C. § 1151(a).

SEC. 201. WORLDWIDE LEVEL OF IMMIGRATION.

(a) In General. -- Exclusive of [aliens not subject to direct numerical limitations], aliens born in a foreign state or dependent areas who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence are limited to - -

(1) family sponsored immigrants described in section 203(a) . . . in a number not to exceed in any fiscal year the number specified in subsection (c) for that year, . . . ;

(2) employment-based immigrants described in section 203(b) . . . in a number not to exceed in any fiscal year the number specified in subsection (d) for that year . . . ; and

(3) . . . diversity immigrants described in section 203(c) . . . in a number not to exceed in any fiscal year the number specified in subsection (e) for that year, ...

3. Section 202(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1152(a)(1).

SEC. 202. NUMERICAL LIMITATION TO ANY STATE.

(a) Per Country Level. --

(1) Nondiscrimination. -- Except as specifically provided in paragraph (2) and in sections 101(a)(27), 201(b)(2)(A)(i), and 203, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

4. Section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5).

SEC. 212. GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND EXCLUDED FROM ADMISSION; WAIVERS OF INADMISSABILITY.

(d)(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 214(f)[relating to strikebreakers], in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such

parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.

5. Section 244A(g) of the Immigration and Nationality Act, 8 U.S.C. § 1254a(g).

SEC. 244A. TEMPORARY PROTECTED STATUS.

(a) Granting of Status. --

(1) In General. -- In the case of an alien who is a national of a foreign state designated under subsection (b) . . . and who meets the requirements of subsection (c), the Attorney General, in accordance with this section--

(A) may grant the alien temporary protected status and shall not deport the alien from the United States during the period in which such status is in effect, ...

(g) Exclusive Remedy. -- Except as otherwise specifically provided, this section shall constitute the exclusive authority of the Attorney General under law to permit aliens who are or may become otherwise deportable or have been paroled into the United States to remain in the United States temporarily because of their particular nationality or region of foreign state of nationality.

6. Section 1 of the Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (reproduced as historical note to 8 U.S.C.A. § 1255).

> Notwithstanding the provisions of section 245(c) of the Immigration and Nationality Act [which when the Cuban Adjustment Act was enacted allowed Western Hemisphere nationals to apply for permanent residence only from outside the United States], the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least two years, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

Supreme Court, U.S.
FILED
MAY 30 1997
CLERK

No. 96-1542

In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERATION FOR AMERICAN IMMIGRATION REFORM, INC., PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has standing to challenge the Attorney General's policy of paroling certain Cuban nationals into the United States in anticipation of subsequently adjusting their status to that of lawful permanent residents, which was adopted to implement an agreement with Cuba to prevent uncontrolled mass migration to the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1542

FEDERATION FOR AMERICAN IMMIGRATION REFORM, INC., PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 93 F.3d 897. The opinion of the district court (Pet. App. 28a-48a) is reported at 897 F. Supp. 595.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. A petition for rehearing was denied on December 30, 1996. Pet. App. 49a. The petition for a writ of certiorari was filed on March 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents a challenge brought under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to an immigration policy adopted by the United States government in response to a recent emergency involving dangerous and uncontrolled mass migration from Cuba. On August 8, 1994, the government of Cuba announced that it would no longer prevent irregular departures from Cuba by sea. That announcement immediately precipitated a massive flow of Cubans to the United States aboard flimsy makeshift rafts and other unsafe vessels. In response to the emergency, the President reversed the United States government's previous policy of bringing Cubans rescued at sea to the United States. Instead, the President directed the Coast Guard to intercept fleeing Cubans at sea, and to transport them to the United States Naval Base at Guantanamo Bay, Cuba, or other safe havens, for repatriation or resettlement. The President also dispatched State Department officials to negotiate an agreement with Cuba to end the uncontrolled migration and to normalize migration between the two countries. See Pet. App. 31a-34a; *Cuban-American Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1417-1418 (11th Cir.), cert. denied, 115 S. Ct. 2578 (1995) and 116 S. Ct. 299 (1995).

On September 9, 1994, the governments of the United States and Cuba reached an agreement that ended the emergency. Under the agreement, embodied in a Joint Communique, Cuba resumed its policy of discouraging its citizens from unlawfully emigrating to the United States by boat. The United States, in turn, agreed to increase the allowable migration of Cubans to the United States. In particular, the

United States agreed to ensure the legal immigration of 20,000 Cuban nationals per year, not including immediate relatives of United States citizens (who are entitled to a significant immigrant visa preference that does not involve a waiting list). See Pet. App. 2a, 33a. To implement the agreement embodied in the Joint Communique, the United States established three policies: first, expanding immigration opportunities for family members of Cubans who have already been issued visas or granted refugee status; second, expanding eligibility for admission to the United States of Cuban nationals who qualify as refugees under the Immigration and Nationality Act (INA), see 8 U.S.C. 1157; and third, paroling into the United States a number of Cuban nationals chosen by lottery from an applicant pool based on factors such as language skills, job skills, education level, family ties, and discrimination in Cuba, and screened for admissibility requirements such as medical, criminal, and public-charge criteria for exclusion. Pet. App. 34a; C.A. App. 68-77.

Under the third policy, once a Cuban national has been allowed to come to the United States, been granted parole, and been physically present in the United States for one year, then the Attorney General may adjust his or her status to that of a lawful permanent resident, pursuant to the authority granted under Section 1 of the Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966), as amended by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(i), 94 Stat. 108 (see 8 U.S.C. 1255 note). If the Attorney General determines that a Cuban national is not eligible for adjustment to permanent resident status, the INS either will take the alien into custody for exclusion proceedings or will

continue the parole in accordance with regulations. See 8 C.F.R. 212.5(d)(2)(i).

The third policy, which is the policy challenged in this case, was based on the Attorney General's authority under Section 212(d)(5)(A) of the INA, 8 U.S.C. 1182(d)(5)(A) (1988), "in her discretion to parole into the United States temporarily under such conditions as [she] may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States."[1] The exercise of the Attorney General's parole authority at issue in this case was deemed to be "in the public interest" because it deterred uncontrolled and dangerous mass migration and promoted a legal and orderly migration flow. See C.A. App. 31; *Immigration and Naturalization Service's General Operations: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House Judiciary Comm.*, 103d Cong., 2d Sess. 91 (1994) (testimony of INS Commissioner Meissner). The same parole authority had been used in the past to permit "boat people" fleeing Indochina and certain nationals of the Soviet Union who had not qualified as refugees under the INA to come to the United States. See *id.* at 65-66, 91.

2. On November 16, 1994, petitioner filed this lawsuit on behalf of its 1,400 members in Dade County, Florida, seeking injunctive relief against the Attorney General's parole of Cuban nationals into the United States and adjustment of their status to that

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[1] Section 212(d)(5)(A) was amended by Section 602(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-689. That amendment is discussed at pp. 9, 18-19, *infra*.

of lawful permanent residents. Petitioner claimed, among other things, that the Attorney General's policy would unlawfully (a) permit aliens to remain in the United States permanently pursuant to parole authority that allows aliens to remain here only temporarily; (b) grant temporary protected status to nationals of an ineligible country; (c) issue immigrant visas, and discriminate in the issuance of immigrant visas on the basis of nationality; and (d) adjust the status of aliens who are ineligible for adjustment under the Cuban Refugee Adjustment Act. Pet. App. 51a-68a.

The district court dismissed the complaint on the ground that petitioner lacked Article III standing to challenge the Attorney General's policy. Pet. App. 28a-48a. The court noted that petitioner had alleged that its members in Dade County "will be confronted with overcrowded public schools, decreased access to public medical facilities, reduced police protection and diminished employment opportunities." *Id.* at 34a. The court concluded, however, that petitioner could not establish that those injuries were either fairly traceable to the challenged action or likely to be redressed by a favorable judicial decision. As to traceability, the court held that "[t]here are simply too many independent variables in the chain of causation linking [the challenged] actions with [petitioner's] injuries," because the Cuban migrants might not settle in Dade County, and because the alleged injuries might be abated by independent actions of the political branches of the Florida government. *Id.* at 44a-45a. As to redressability, the court stressed that, even if the Attorney General's policy were invalidated, the same number of Cuban migrants might arrive through lawful means or

through uncontrolled migration, either of which would create the same pressures on public services in Dade County. *Id.* at 46a.

3. A divided panel of the court of appeals affirmed the dismissal of the complaint. Pet. App. 1a-13a. The court ruled that, even if petitioner had Article III standing, petitioner lacked standing under the APA because the interests asserted in its complaint were not within the "zone of interests" that Congress sought to protect under the statutory provisions of the INA alleged to have been violated. *Id.* at 4a-13a. Judge Rogers dissented, and would have held that petitioner had standing. *Id.* at 13a-27a.

The court of appeals considered and rejected three grounds that petitioner claimed as bases for its standing under the APA. First, the court noted that petitioner argued that a "rush of immigrants" to Dade County would generate unemployment and wage reductions in the area and would place burdens on public services there. But, the court concluded, neither the language nor the legislative history of the statutes alleged to have been violated "even hints" at congressional concern about the *regional* impact of immigration. Pet. App. 6a. The court stated that "brief references to regional effects" of immigration in the legislative history of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3394, were not related to the statutes that are the bases for the legal challenges in this case, and it concluded that those references "do little to establish that individuals living in immigration-impacted areas are either beneficiaries of, or otherwise suitable challengers under, the apparently unrelated statutory provisions that [petitioner] claims the government violated here." Pet. App. 7a.

Second, the court considered and rejected the possibility that legal residents throughout the United States might have standing on the basis of their interest in avoiding immigration-related unemployment and stresses on the provision of government services. "[T]he widespread nature of this alleged interest, indeed its near universality," suggested to the court that it was not a proper basis for a challenge under the APA to the admission of aliens. Pet. App. 7a-8a. While the court did not hold that Congress was *unable* to vest standing in a member of the general public to challenge admission of aliens, it did observe that "[t]he injury (if any) to a citizen qua citizen from admission of an alien is an injury common to the entire population, and for that reason seems particularly well-suited for redress in the political rather than the judicial sphere." *Id.* at 8a.

The court acknowledged that it saw "little that pushes us one way or the other in discerning whether Congress intended to permit suit by members of this broad class [of legal residents in the country]." Pet. App. 9a. It further noted that, under its precedents, an "affirmative signal" of congressional intent to permit suit is not required for a finding of standing under the APA. But, the court observed, the *absence* of a clear congressional intent to forbid the suit does not automatically *confer* standing on a plaintiff, and the court must examine the particular character of the asserted interest and the particular context in which the challenge arises to determine whether Congress intended to permit suit at the behest of a particular plaintiff. *Id.* at 9a-10a.

To the court, the "immigration context" made it doubtful that Congress intended to permit suit by those who "identify themselves as likely to suffer

from the generic negative features of immigration." Pet. App. 10a. The court noted that there was little reason for Congress to believe that immigration authorities would be subject to "acute pressure from powerful pro-immigration interest groups," such that Congress might have wanted to create a counterbalancing force in "universal litigative champions." *Ibid.* In the court's view, the immigration context contrasted sharply with environmental regulation, in which government agencies may be subject to pressure by powerful interest groups (regulated firms) that Congress might deem to be distorting influences. In the context of environmental law, the court suggested, it was therefore more reasonable to conclude that Congress wanted "universal champions" to vindicate the legal interest in the environment. *Ibid.* The court further observed that the injury alleged in this case is even more diffuse than injuries alleged in environmental cases, since the injury alleged to result from increased immigration "appears no different from the crowding effect that might be expected from any abrupt surge in the adult population." *Ibid.*

Finally, the court of appeals found insufficient petitioner's alleged employment-based interest in limiting immigration. Pet. App. 11a-13a. The court acknowledged that some provisions of the INA limiting the issuance of immigrant visas do reflect a "clear concern" about protecting job opportunities for United States citizens. *Id.* at 11a-12a. The court stressed, however, that petitioner was not alleging that the Attorney General's parole policy violated those particular statutory limitations. While the court observed that "we do not look at the specific provision said to have been violated in complete isolation," it noted that this Court had stated that courts

applying the zone-of-interest analysis must look only to provisions "having an 'integral relationship' with the provisions under which the suit was brought." *Id.* at 12a (quoting *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 530 (1991)). Finding no "integral relationship" between the numerical limitations on immigration in the INA and the specific statutory provisions alleged by petitioner to have been violated, the court concluded that petitioner lacked standing under the APA. Pet. App. 13a.

4. On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-689, the most significant revision of the immigration laws in 70 years. Section 602 of the IIRIRA modified the Attorney General's parole authority under 8 U.S.C. 1182(d)(5)(A) by requiring it to be exercised "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." See Pet. App. 70a-71a. Section 602 also directs the Attorney General to provide to both Houses of Congress a yearly report of the total number of aliens paroled into the United States, the purpose and duration of their parole, and the country of their nationality. See IIRIRA § 602(b), 110 Stat. 3009-689 to 3009-690.

ARGUMENT

Petitioner argues that the interests it asserts on behalf of its members in Dade County fall within the "zone of interests" protected by the INA's restrictions on the Attorney General's authority to permit migration to the United States, and that it therefore has standing to challenge the Attorney

General's parole policy. Petitioner maintains that Congress has been concerned about the negative effects of excessive immigration on such matters as employment and public services, and that the provisions that form the basis for its challenge to the parole policy are integrally related to its members' interest in avoiding those negative effects. That contention does not provide a basis for petitioner to sue under the APA. Moreover, petitioner cannot in any event make the necessary threshold showing that it or its members have Article III standing to challenge the parole policy. In addition, no other court of appeals has held that the Attorney General's decision to grant parole is subject to review under the APA. Further review is therefore not warranted.

1. Petitioner's claim does not present a matter that is subject to judicial review under the APA. The Attorney General's decision, through an exercise of her parole authority, to permit an alien to be physically present in the United States without the restraint of custody is committed by law to her discretion. Petitioner contends that certain limitations in the INA make unlawful the Attorney General's decision to permit the paroled Cubans to reside in the United States. That claim, however, cannot surmount the general presumption of unreviewability of agency decisions concerning the enforcement against third parties of laws intended to preserve the public welfare. *Heckler* v. *Chaney*, 470 U.S. 821, 834 (1985). Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973) (holding that a private citizen generally lacks a judicially cognizable interest in the prosecution of another).

Nothing in the INA suggests that Congress intended to reverse that presumption, and to allow

residents of the United States to challenge under the APA the Attorney General's decision to allow unadmitted aliens to remain in the country and at liberty. To the contrary, Section 1182(d)(5)(A) provides that the Attorney General may, "in her discretion," parole aliens into the United States "under such conditions as [s]he may prescribe," if she determines that the parole will provide a "significant public benefit." 8 U.S.C. 1182(d)(5)(A) (Pet. App. 70a). That language "commit[s] complete discretion" to the Attorney General to decide whether to place aliens in exclusion or deportation proceedings, or whether (by contrast) to exercise her parole authority. Cf. *Chaney*, 470 U.S. at 835. Congress has recognized that the Attorney General "is far better equipped than the courts to deal with the many variables involved in the proper ordering of [the relevant] priorities," *id.* at 831-832, and accordingly has not authorized judicial review of the decision to grant parole.

The structure and context of the INA also suggest that Congress has precluded judicial review of the Attorney General's decision to grant parole. In the INA, Congress has created certain limited and carefully focused avenues of judicial review of immigration decisions. For example, Congress has provided in the INA that certain aliens who are subject to the coercive power of the government through the entry of deportation orders may petition for review of those orders in the courts of appeals. INA § 106, 8 U.S.C. 1105a (1994).[2] Congress has not, however,

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[2] In Section 306 of IIRIRA, the judicial review provisions of the INA were replaced, effective April 1, 1997, by a new

established any similar avenue for members of the public to gain judicial review of the Attorney General's decision *not* to deport an alien. "In the context of the statute's precisely drawn provision[s], the omission [of judicial review of the Attorney General's decision to grant parole] provides persuasive evidence that Congress deliberately intended to foreclose further review of [petitioner's] claims." *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); see *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 346-347 (1984).

The immigration context lends particular force to the conclusion that Congress has precluded review of petitioner's claims. This Court has repeatedly expressed reluctance to interfere in the Executive Branch's decisions to admit or exclude aliens, absent express authorization of review by Congress. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); *Heikkila* v. *Barber*, 345 U.S. 229, 233-234 (1953); *Fok Yung Yo* v. *United States*, 185 U.S. 296, 305 (1892). In light of this "recognized and declared policy," *ibid.*, of judicial nonintervention, the absence of any express provision for review of the Attorney General's exercise of her parole authority is persuasive evidence that Congress precluded such review.

2. Petitioner also lacks Article III standing to sue in this case. Petitioner has based its claim to standing on the allegation that, "as a result of the new Cuban immigration programs, its members residing in [Dade County] will be confronted with overcrowded public schools, decreased access to public medical facilities, reduced police protection, and diminished

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Section 242 of the INA, to be codified at 8 U.S.C. 1252. 110 Stat. 3009-607.

employment opportunities." Pet. App. 34a. As the district court concluded, however, petitioner cannot show that its alleged injuries are either fairly traceable to the challenged actions or likely to be redressed by a favorable judicial decision. *Id.* at 43a-46a. "There are simply too many independent variables in the chain of causation linking [respondents'] actions with [petitioner's] injuries." *Id.* at 44a.

This is not a case in which the plaintiff challenging the governmental action is itself an object of the action at issue. Rather, petitioner's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, namely, the Cuban nationals paroled into the United States. In such a situation, "much more is needed" than bare allegations of harm to the plaintiff, because "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992). Petitioner has the burden of alleging (and eventually proving) facts "showing that these [responses] have been or will be made in such a manner as to produce causation and permit redressability of injury." *Ibid.* Petitioner's standing is not precluded by the difficulty of accounting for third-party actions, but standing here is "'substantially more difficult' to establish" than in the routine case in which a regulated party challenges the government's treatment of it. *Ibid.*; see *Warth* v. *Seldin*, 422 U.S. 490, 503-507 (1975).

Petitioner has failed to allege facts indicating that its asserted injuries are traceable to the challenged actions of the government. As the district court pointed out, the Attorney General's parole plan does

not require the admitted Cubans to settle in Dade County. The Cuban migrants will be given documentation to enter at any port of entry in the United States and may settle anywhere in the United States. Pet. App. 45a. Further, there is no basis for assuming that the alleged injuries petitioner's Dade County members may experience in the future (*e.g.*, crowding of schools and health care facilities, and increased competition for jobs) will be attributable to settlement by the paroled Cuban immigrants. Petitioner "ignores the common fact that Florida is a desirable place to live. Indeed, for many years there has been a constant flow of immigration into Florida from not only Cuba but also from other countries as well as from citizens of the United States." *Ibid.* Petitioner has not alleged or pointed to facts indicating that any crowding effects will be caused by any incremental migration of Cubans to Dade County that may be attributable to the challenged parole policy, rather than the general trend of settlement to Florida from other parts of the country and from other countries.

For similar reasons, petitioner has failed to allege facts sufficient to show that its injury can be redressed by a favorable judicial decision. Even if the courts were to declare invalid the Attorney General's exercise of her parole authority, it would still be possible for Cubans in similar numbers to enter the United States, legally or illegally. Pet. App. 46a. Moreover, settlement of non-Cubans in Dade County might well continue. Thus, "[t]he public schools would be just as overcrowded, the public health facilities would be just [as] overburdened, the police department would be just as overworked and the job market would be just as oversaturated." *Ibid.* And, petitioner has not alleged any facts indicating that

the politically accountable authorities of Florida and Dade County will fail to take action to ameliorate any crowding of schools, health facilities, and the like that may result from immigration and increased development in Florida. Cf. *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 614-615 (1989) (opinion of Kennedy, J., for four of eight Justices) (concluding that taxpayers and schoolteachers lacked standing to challenge state mineral leases, because intervening "policy decisions might be made in different ways by the governing officials," and those "unfettered choices made by independent actors" were not within the courts' power "either to control or to predict").

Finally, petitioner's complaint does not suggest which schools its members' children might be entering along with the children of immigrants, which job markets its members might be entering in competition with Cuban immigrants, or which public health facilities might be overtaxed by Cuban immigration. Those failings indicate that petitioner has not even alleged injury in fact sufficient to survive a motion to dismiss. See *Warth*, 422 U.S. at 516-517. Petitioner therefore lacks constitutional standing to challenge the Attorney General's exercise of her parole authority in this case.

3. a. The court of appeals correctly ruled that petitioner in any event lacks "prudential standing" under the APA to challenge the Attorney General's exercise of her parole authority. As the court concluded, there is no evidence that Congress intended, in the provisions alleged to have been violated, to protect residents of particular regions affected by immigration, Pet. App. 6a-7a, or to permit a judicial challenge to the exercise of immigration authority based on the "near-universal character of the assert-

ed interest of citizens qua citizens" in ensuring that public services and facilities are not overburdened, *id.* at 9a. And petitioner has not shown that any interest its members may have in avoiding the allegedly deleterious effects of increased immigration is related to the provisions on which its challenge is based. *Id.* at 11a-13a.

As this Court has explained, a plaintiff who seeks review of agency action under the APA "must establish that the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1167 (1997) (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990)); see *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). A plaintiff's standing under the APA thus requires more than injury in fact; it also requires that the statutory provision relied on have been intended "for the benefit of" the person or class of persons asserting the challenge. See *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 526 (1991). While this Court has not required an express statement in the statute or legislative history that Congress enacted the statute for the benefit of the plaintiffs, see *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 398-400 (1987), it has required the plaintiff must show that it is seeking to vindicate "the *sorts* of interests those statutes were specifically designed to protect," *National Wildlife Fed'n*, 497 U.S. at 886.

Petitioner cannot make that showing in this case. Petitioner argues that Congress expressed concern, in the legislative history of 1921, 1965, and 1986 immigration legislation, that uncontrolled immigra-

tion would lead to regional congestion, unemployment, and housing shortages, and that Congress has also from time to time noted the need to protect the domestic labor market from an influx of immigrant labor. Thus, petitioner argues, Congress placed numerical limits on the level of permissible immigration to minimize those negative consequences of immigration. Even if we accept, however, that Congress has been concerned about the potentially negative consequences of excessive immigration, petitioner's interest in avoiding those consequences is not related to the statutory provisions that form the bases for its challenge in this case.

Petitioner argues principally that the parole policy violates statutory limitations on the Attorney General's discretionary authority to grant parole. That argument misconceives the nature and purpose of both the parole authority and its limitations. Parole is an exception to the statutory direction that the Attorney General detain aliens pending a determination of their admissibility and immediately return them to their country of departure if they are deemed inadmissible. See 8 U.S.C. 1222, 1225, 1226(e); *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958). Parole is intended to protect the interests of the sovereign and the aliens by affording needed flexibility. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) ("While the government might keep entrants by sea aboard the vessel pending determination of their inadmissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course."); see also *Jean* v. *Nelson*, 727 F.2d 957, 971-972, 975 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985).

The statutory limitations on the Attorney General's parole authority are designed principally to ensure that Congress retains primary authority to set immigration policy, not to protect distinct interests of citizens and legal residents in avoiding the detrimental effects of an excessive influx of immigrants. In a sense, the Attorney General's parole authority might be said to be related to *all* the restrictions, substantive and numerical, on immigration contained in the INA. "But if that were enough, then *every* provision constraining the admission of anyone under any circumstances (including any provision *allowing* the admission of anyone, for all such permissive provisions necessarily have their limits) would be pertinent in applying the zone-of-interests test to *any* provision" of the INA. Pet. App. 13a.[3]

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[3] Petitioner suggests (Pet. 7) that the legislative history of the IIRIRA indicates congressional disapproval of the parole program challenged here. That submission is incorrect. The legislative history cited by petitioner relates to unenacted provisions that would have specified the instances in which an alien might be paroled—thus largely eliminating the flexibility and discretion of the parole provision—and would have introduced a new category of "humanitarian visa" that would have permitted the Attorney General to admit up to 10,000 aliens each year. See H.R. 2202, 104th Cong., 2d Sess. §§ 523-524 (1996). The legislative history of that rejected provision reflects criticism of the Cuban parole program. H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 140-141 (1996). Even that legislative history, however, suggests that Congress was concerned, not with the negative effects of increased population, but with preserving Congress's authority over immigration policy. *Id.* at 141, 175. Rather than enact the proposed revision of parole, Congress maintained the discretion of the Attorney General (with some modification) to parole aliens into the United States, and directed the Attorney General to report

Petitioner has also argued that the parole policy violates the Cuban Refugee Adjustment Act, which permits the Attorney General to adjust to permanent resident status those paroled Cuban nationals who are eligible to receive an immigrant visa and are admissible into the United States. There is no indication in the background of the Cuban Adjustment Act that those provisions have anything to do with the injuries that petitioners claim to suffer from parole of Cuban nationals into the United States. Petitioner is arguing, in essence, that all Cubans seeking permanent resident status in the United States must be subject to the INA's numerical limits on immigrant visas and may not be admitted under any other provision. Even if that point were correct on its merits (which it is not),[4] petitioner has pointed to nothing to indicate that Congress was directly concerned about the detrimental effects on residents' access to employment and public services when it specified which Cubans might be granted parole and permanent resident status under the Cuban Adjustment Act.[5]

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yearly to Congress concerning the exercise of parole, so that Congress could exercise appropriate oversight. That provision for oversight strongly reinforces the conclusion that enforcement of limitations on the Attorney General's exercise of her parole authority is a matter between the political Branches.

[4] See *Silva* v. *Bell*, 605 F.2d 978, 981 (7th Cir. 1979); *Federation for American Immigration Reform* v. *Meese*, 643 F. Supp. 983, 987 (S.D. Fla. 1986) (Cubans paroled and adjusted under Cuban Refugee Adjustment Act not subject to numerical limits on immigrant visas or substantive preference categories).

[5] Petitioner has also alleged that the challenged parole policy violates 8 U.S.C. 1254a(g), which permits the Attorney General to grant "temporary protected status" to an otherwise deportable alien from a designated country, but provides that such temporary protected status is the "exclusive authority" of

Similarly, the interests asserted by petitioner are not within the zone of interests protected by the INA's statutory prohibition against discrimination in the issuance of visas on the basis of nationality, 8 U.S.C. 1152(a)(1). The prohibition against nationality-based discrimination and preference concerns only the relative treatment of nationals of various countries who are seeking admission to the United States; it is not intended to control or reduce the total amount of immigration, or ameliorate the adverse effect of immigration inside the United States. Section 1152(a)(1) therefore has no relation to the injuries that petitioner's members claim they will suffer as a consequence of the parole policy.

b. As the court of appeals observed, it is not reasonable to infer that Congress would have intended to permit a judicial challenge to immigration policies based on the interest of "legal residents throughout the United States" in employment and public services. Pet. App. 7a-8a. Petitioner points out that individuals with particularized injuries may sue to challenge government action, even if those injuries are widespread. Pet. 21-23. But while the fact that an injury is widespread does not necessarily bar

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the Attorney General to decline to deport such aliens because of their particular nationality. That provision creates a mechanism by which the Attorney General may offer a temporary safe haven to aliens because of disruptions in their home countries such as armed conflict, disaster, and other temporary and extraordinary conditions. As with the restrictions on the parole authority discussed in the text, there is no direct relation between the restriction on the Attorney General's authority to grant temporary protected status and the various interests in resisting increased immigration asserted by petitioner.

standing under Article III, it is relevant to the inquiry whether Congress intended such an injury to the basis for a challenge under the APA. Under petitioner's theory, anyone in the country could argue that the admission of any alien could adversely affect him. If the interest of any legal resident in avoiding any deleterious effect of immigration were a sufficient basis for standing, then immigration policies of the Attorney General would effectively be subject to universal challenge. Yet "even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-475 (1982). Because Congress legislates against that understanding, it is not reasonable to conclude that Congress intended to confer petitioner a right to sue under the APA.

These failings are not remedied by the fact that petitioner has suggested that Congress was particularly concerned about the impact of immigration on certain regions. For standing, it is not sufficient for petitioner to argue that immigration will have a regional impact; petitioner must show that it, or its members, are themselves "among the injured." *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972). For purposes of standing, there must be an impact on the individual seeking relief; "a party seeking review must allege facts showing that he is himself adversely affected." *Id.* at 740. It adds nothing to petitioner's claim to standing, therefore, that Con-

gress might have been concerned about the regional effects of immigration, for petitioner must show that the particular provisions allegedly violated were intended by Congress to protect *its members'* individual interests in being free from deleterious effects of immigration. Cf. *Blessing* v. *Freestone*, 117 S. Ct. 1353, 1362 (1997) (in action brought under 42 U.S.C. 1983, plaintiff must show that statute "give[s] rise to individual rights," and does not just compel agency adherence to federal law).

In rejecting petitioner's theory of universal standing, the court of appeals correctly recognized that immigration policies are fundamentally different from other regulatory policies that are subject to challenge at the behest of many citizens, such as agency interpretations of the environmental laws. Pet. App. 10a-11a. Petitioner argues that the court of appeals' discussion on this point improperly analyzes standing based on a balancing of the political significance of various interest groups affected by the pertinent regulatory process. Pet. 23-25. We do not read the court of appeals' decision to adopt such a mode of analysis. Rather, the court made the sensible context-based observations that the government's power over immigration, unlike the power to regulate the environment, is a quintessentially political power customarily committed to the discretion of the political Branches of government, and that private interests ordinarily do not play as significant a role in the exercise of that authority. In any event, the court of appeals' more significant point was its further observation that the injury asserted here "is as diffuse as can be imagined" and is "borderless and universal in a way that even environmental injury is not." Pet. App. 10a-11a. As a result, it is not reason-

able to conclude that Congress intended to permit immigration policies to be challenged under the APA at the behest of any legal resident who might claim that his or her well-being would be impaired by increased immigration.

4. This Court has granted review to decide whether banks fall within the "zone of interests" of a provision of the Federal Credit Union Act permitting credit union membership by groups with a "common bond," 12 U.S.C. 1759, and therefore have standing under the APA to challenge an interpretation of that provision by the National Credit Union Administration. *National Credit Union Administration* v. *First National Bank & Trust Co.* (*NCUA* v. *First National Bank*), cert. granted, No. 96-843 (Feb. 24, 1997). The petition in this case, however, need not be held for *NCUA* v. *First National Bank*, for it is unlikely that the Court's decision in that case would affect the outcome in this case. In *NCUA* v. *First National Bank*, the government has argued that the D.C. Circuit erred in applying an APA standing test that accords standing, even in the absence of any demonstrable congressional benefit to the plaintiff, when there is "some indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect." See 96-843 Gov't Br. 22-26 (arguing that D.C. Circuit's "suitable challenger" test is inconsistent with this Court's more restrictive APA standing decisions); *Hazardous Waste Treatment Council* v. *EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989).[6] In this case, however, the court of appeals ruled that petitioner

[6] We are providing petitioner with a copy of our brief on the merits in *NCUA* v. *First National Bank*.

does not have APA standing even under its "suitable challenger" test. See Pet. App. 4a. Thus, even if this Court were to sustain the D.C. Circuit's decision in *NCUA* v. *First National Bank* as a proper exposition of APA standing, the lower courts would still find that petitioner lacked standing in this case. If, on the other hand, this Court were to hold in *NCUA* v. *First National Bank* that a more rigorous analysis of standing should be applied in APA cases, then petitioner would lack standing *a fortiori*. Moreover, as we explain above, petitioner's suit fails for the additional reasons that petitioner lacks Article III standing and that the challenged parole decisions are commited to the discretion of the Attorney General and precluded from review under the APA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 96-1542

In the
Supreme Court of the United States

OCTOBER TERM, 1996

FEDERATION FOR AMERICAN IMMIGRATION REFORM, INC.,
Petitioner

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
Respondents

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The Petition Should be Granted Because it Presents the Same Issue as NCUA v. First National Bank.

On February 24 this Court granted a writ of certiorari to the District of Columbia Circuit in *National Credit Union Administration [NCUA] v. First National Bank & Trust Co., No. 96-843,* to review the same issue that is presented in FAIR's petition--whether the Circuit's "suitable challenger" test for APA standing is consistent with the APA standing test in *Clarke v. Securities Indus. Ass'n,* 479 U.S. 388 (1987). In *NCUA* the plaintiffs were held to be "suitable challengers" of statutory violations by a federal agency and were allowed standing; in FAIR's case the court below decided that FAIR was not a "suitable challenger" of Respondents' actions and denied standing.

Respondents urge that FAIR's petition be denied even though it presents the same issue as *NCUA*, arguing that the District of Columbia Circuit is likely to deny FAIR's standing whether or not this Court rejects the "suitable challenger" test when it decides *NCUA*. (Opp. at 23-24) Respondents' argument erroneously assumes that the "suitable challenger" test is a less restrictive standing test than the *Clarke* test so that any plaintiff that has failed the "suitable challenger" test must also fail the *Clarke* test. In fact the "suitable challenger" test is neither more nor less restrictive than the *Clarke* test. It is a wholly different test that may sometimes permit standing to plaintiffs that fail the *Clarke* test and may sometimes deny standing to plaintiffs that pass the *Clarke* test.

Clarke held that congressional intent to permit APA review of alleged statutory violations was presumed "unless the plaintiff's interests are so marginally related to or

inconsistent with the purposes implicit in the statute" that the assumption of reviewability would be unreasonable. *Clarke*, 479 U.S. at 399. In a series of cases beginning with *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989), the District of Columbia Circuit has given increasingly less weight to the relationship between the plaintiffs' interests and the statutes' purposes than to the plaintiffs' perceived "suitability" as "litigative champions" of the public interest. Thus, FAIR was found to be an "unsuitable" challenger, not entitled to standing, even assuming that the interest of FAIR members in preventing immigration-related injuries fell within the statute's zone of interests. (Pet. at 7a-8a) In *NCUA* the bank plaintiffs were found to be "suitable" challengers of credit union statute violations, entitled to standing, even though the banks' interests were, according to the government, unrelated to those protected by the statute. *NCUA*, Pet. 9-10.

This Court's review of the District of Columbia Circuit's "suitable challenger" test would be incomplete if it did not take into account how the test has been used to deny standing as well as to allow it.

2. FAIR Challenges Respondents' Own Unlawful Acts, not their Nonenforcement of the Law.

Citing *Heckler v. Chaney*, 470 U.S. 821 (1985), Respondents argue that FAIR's petition should be denied because FAIR's complaint seeks enforcement of the Immigration and Nationality Act ("INA") against third parties. (Opp. 10) That is not correct. FAIR's suit demands, not that Respondents prosecute immigration lawbreakers, but that Respondents not break the law themselves by paroling or accepting inadmissable

immigrants, by issuing them work authorization and entry documentation, and by adjusting them to lawful permanent resident status. (Pet. 63a-67a) The APA's rebuttable presumption that an agency's decision not to enforce a statute is nonreviewable "did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers". *Heckler v. Chaney,* 470 U.S. at 833.

3. FAIR Challenges a Breach of Statutory Limits on Discretion, not the Exercise of Discretion itself.

Respondents assert that FAIR's claims are unreviewable under the APA because the parole authority is committed to Respondent Reno's "complete discretion". (Opp. 10-12, 24) In fact, federal courts, including this Court, have treated exercises of the parole authority as reviewable under the APA. *E.g, Jean v. Nelson,* 472 U.S. 846 (1985). Moreover, FAIR's complaint addresses a breach of the statutory limits that constrain Respondent Reno's parole authority, not how she chooses to exercise her discretion within those limits. (Pet. 16a-17a) Finally, while parole itself is discretionary, several of the other challenged actions are clearly *not* within Respondents' discretion, such as the issuance of documents allowing inadmissable immigrants to "enter and remain in the United States permanently". (Pet. 64a-67a)

The specification of judicial review procedures in a few INA provisions does not, as Respondents assert (Opp. 11-12), foreclose by implication review of unrelated provisions like those at issue in FAIR's complaint. "[T]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967) (quoting

L. Jaffe, Judicial Control of Administrative Action 357 (1965)). Moreover, a number of INA provisions contain *restrictions* on judicial review, which Congress would not have troubled itself to impose if the statute were generally nonreviewable. *E.g.*, 8 U.S.C. §§ 1158(a)(3), 1158(b)(3), 1160(e)(3), 1182(a)(5)(C)(iii), 1229c(f), 1254a(b)(5)(A), 1255a(f)(4)(A).

4. FAIR Sufficiently Alleged Article III Standing.

Respondents urge denial of FAIR's petition based on the district court's holding that FAIR lacks Article III standing. (Opp. at 12-15, 24) Although the majority opinion in the court of appeals based its affirmance solely on prudential standing and did not address Article III standing, the dissenting opinion includes a thorough refutation of the district court's reasoning. (Pet. 20a-24a)

Respondents contend that FAIR's complaint has not alleged enough facts to establish Article III standing. (Opp. 14-15) That contention is belied by the complaint itself. (Pet. 53a-54a, 57a-60a) Moreover, on a motion to dismiss it is presumed "that general allegations embrace those specific facts that are necessary to support the claim". *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990).

5. The INA's Restrictions on Parole Were Intended to Prevent Evasion of the INA's Immigration Limits.

Because the majority below acknowledged that the INA's immigration limits were intended to protect the employment of U.S. residents, they would have recognized FAIR's prudential standing but for their conclusion that the immigration limits had no "integral relationship" with the parole authority. (Pet. 11a-13a) Inexplicably, the majority's

determination takes no account of the 1952 legislative history cited in the dissenting opinion (Pet. 16a-17a), nor of the 1965 and 1996 legislative history cited in FAIR's petition (Pet. 13-14), all of which unambiguously declare that the INA's restrictions on parole were intended to prevent the use of parole to evade the INA's immigration limits.

Respondents state that the 1996 legislative history is irrelevant because it describes unenacted legislation. (Opp. 18 n.3) That statement is inaccurate. While some provisions of the original 1996 bill were not enacted into law, Congress *did* enact the requirement that parole be exercised on a "case-by-case" basis, the very provision described in the committee report as reinforcing longstanding restrictions against using parole to admit immigrants outside the INA's limits. (Pet. 7)

CONCLUSION

For the reasons set forth in the petition and herein, the writ of certiorari should be allowed.

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